SHDKT PROCEEDINGS AND ORDERS DATE: [11/27/90]

CASE NBR: [89101667] CFX STATUS: [DECIDED]
SHORT TITLE: [Palmer, Jay]
VERSUS [BRG of Georgia, Inc.] DATE DOCKETED: [042590]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Apr 25 1990	G	Petition for writ of certiorari filed.
2	May 23 1990		Brief of respondent Hartcourt Brace in opposition filed.
3	May 29 1990		DISTRIBUTED. June 14, 1990
4	Jun 1 1990	X	Reply brief of petitioners Jay Palmer, et al. filed.
5	Jun 18 1990	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Sep 17 1990		Brief amicus curiae of United States filed.
7	Sep 19 1990		REDISTRIBUTED. October 5, 1990
8	Sep 27 1990	X	Brief of petitioners ~~Jay Palmer~~, et al. in response to brief of the United States as amicus curiae filed.
10	Oct 9 1990		REDISTRIBUTED. October 12, 1990
12	Oct 15 1990		REDISTRIBUTED. October 26, 1990
14	Oct 29 1990		Record requested.
16	Nov 13 1990		REDISTRIBUTED. November 21, 1990
17	Nov 20 1990		Record filed.

Last page of docket

CASE NBR: [89101667] CFX STATUS: [DECIDED]
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	DATE	NOTE	PROCEEDINGS & ORDERS
18	Nov 26 1990		Petition GRANTED. Judgment REVERSED and case REMANDED. Dissenting opinion by Justice Marshall. Opinion per curiam. Justice Souter OUT.

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89-1667

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAY PALMER, et al.,
Petitioners,
v.
BRG OF GEORGIA, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN C. BUTTERS
(Counsel of Record)
P.O. Box 7129
Atlanta, Georgia
30357-0129
(404) 872-5693

Of Counsel:
JAMES F. PONSOLDT
Professor of Law
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5209

Tower Printing Company, 2 Peachtree St., Atlanta, Georgia 30383, (404) 659-4080

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Questions Presented

1. Whether concerted action between competitors is <u>per se</u> illegal price-fixing or market allocation under Section One of the Sherman Act, when the defendants' purpose is to "allocate" rather than "divide" markets and to increase 500% and share rather than literally "fix" prices.
2. Whether a Sherman Act plaintiff in a Section One "Rule of Reason" and Section Two conspiracy to monopolize case necessarily must submit structural evidence to prove specifically-defined markets.
3. Whether the unexplained disparity between the majority and dissenting opinions below describing the contents of the summary judgment record, and the

applicable summary judgment standard, is so great as to suggest a departure from accepted judicial standards, requiring exercise of this Court's supervisory power.

List of Parties and Rule 29.1 Statement

The petitioners herein are: JAY L. PALMER, MICHAEL L. CHIDESTER, TERI L. POWERS, DAVID DUNBAR, and WILLIAM R. FERGUSON. In addition, BENJAMIN M. FIRST was party to the proceedings in the courts below. They seek to represent a class of purchasers of respondents' bar review course in northeast Georgia between 1984 and the present.

The respondents herein, each of whom was a party to the proceedings below, are as follows: BRG OF GEORGIA, INC., BAR REVIEW GROUP, INC., BRG PUBLICATIONS, INC., HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., and RONALD O. PELLETIER.

Harcourt, Brace, Jovanovich Legal and Professional Publications, Inc., is a subsidiary of Harcourt Brace Jovanovich,

Inc.

The Department of Justice, representing the United States, submitted an amicus curiae brief in the Court of Appeals, supporting Plaintiffs'-Petitioners' request for en banc rehearing.

Bryan Downs, representing the Student Bar Association of the University of Georgia School of Law, and Margaret Murphy, representing the third year class of that school, submitted an amicus curiae brief in the court of appeals, supporting the request for en banc rehearing.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Jay Palmer, et al.,
Petitioners,
v.

BRG of Georgia, Inc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, purchasers of defendants' comprehensive Georgia bar review course, respectfully pray that a writ of certiorari issue to review (i) the judgment of the United States Court of

Appeals for the Eleventh Circuit, entered in this action on June 7, 1989, as amended on January 29, 1990, and (ii) the Order of the Court of Appeals, dated January 29, 1990, denying petitioners' petition for rehearing and suggestion of rehearing en banc.

OPINIONS BELOW

The original majority and dissenting opinions of the United States Court of Appeals for the Eleventh Circuit are reported at 874 F.2d 1417 and are reproduced as Appendix A at App. pp. 1-129.

The opinion and Order of the United States Court of Appeals for the Eleventh Circuit amending the above majority opinion and denying rehearing and rehearing en banc is reported at 893 F.2d

293 and is reproduced as Appendix B at App. pp. 129-133.

The opinions of the District Court for the Northern District of Georgia, dated January 9 and July 16, 1987, granting summary judgment to defendants are not reported and are reproduced as Appendix C at App. pp. 134-161, Appendix D at App. pp. 164-165, and Appendix E at App. pp. 166-178.

The Order of the United States Court of Appeals for the Eleventh Circuit granting the Motion of the United States of America for leave to file a Brief Amicus Curiae In Support of Rehearing En Banc is not reported and is reproduced as Appendix F at App. pp. 179-180.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 7, 1989. A timely petition for rehearing and a Suggestion of Rehearing en banc were denied on January 29, 1990. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections One and Two of the Sherman Antitrust Act, 15 U.S.C. 1 and 2, provide in relevant part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." (15 U.S.C. §1)

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed [to have

violated this Act]...." (15 U.S.C. §2).

Rule 56, F.R.Civ.P., provides in relevant part as follows:

"...The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

STATEMENT OF THE CASE

Between 1976 and March, 1980, respondents BRG of Georgia, Inc. and/or its predecessor corporations and their owner, respondent Pelletier (hereinafter, "BRG"), competed directly against respondent Harcourt, Brace, Jovanovich Legal and Professional Publications, Inc. and its president, Conviser (hereinafter, "HBJ") in the sale of comprehensive Bar

review courses in Georgia, relevant to the Georgia Bar examination, 874 F.2d 1428, 1429 (text accompanying fn. 5). During that time, the two competitors engaged in "vitriolic" comparative marketing and price competition, also exchanging threatening correspondence. In early 1980, the list price for each course was approximately $150, id., at 1429.

HBJ sells bar review courses for the respective bar examinations in more than 40 states under the trade name, "Bar/BRI," and is the largest provider in the country, id. at 1429. Its price in Georgia of $150 during 1980 was allegedly below its marginal cost, according to Conviser, id. at 1429. BRG had sold courses solely in Georgia but, in reincorporating with a name change from "Bar Review Group, Inc." to "BRG of

Georgia, Inc.," and in correspondence to HBJ in 1979, implied an intention to expand its markets, R. 2-13 ex. B, pg. 3.

Between 1978 and 1980 the defendants possessed a combined statewide market share of between 80%, according to Pelletier, id., at 1440, and 93%, according to a five-year market survey conducted by an economics expert (Dr. David Kamerschen), id., at 1439 and fn. 37. Since Georgia permits third year law students to take the bar examination while they are full-time students, an opportunity which a majority of the students take advantage of, bar review courses are sold and provided in the three cities in Georgia in which law schools are located -- Atlanta, Athens, and Macon. Almost all student-consumers purchase and attend the course in the city where they

attend law school, in view of transportation time and costs for travel between sub-markets. Id. , at 1440.

In early 1980, while directly competing, Conviser (for HBJ) and Pelletier (for BRG) "got together" for three private meetings to discuss various proposals for eliminating their competitive relationship, id., at 1429 and at fn. 5. They eventually reached an agreement and entered into a combination for that purpose, id., at 1429, later memorializing their combination in 1980 in a written "licensing agreement," id. The written contract constituted direct evidence of the existence and terms of the conspiracy entered into between HBJ and BRG: it contained (i) mutual covenants not to compete; (ii) a national market allocation clause, assigning retail

customers in the state of Georgia to BRG and retail customers in the other 39 states in which HBJ or its "licensees" then were doing business to HBJ; (iii) a clause giving the exclusive right to BRG to purchase and resell in Georgia HBJ's written bar review materials; (iv) a clause giving the exclusive right to BRG to use HBJ's "Bar-Bri" tradename in Georgia; and (v) a clause providing for BRG to pay 40% of its net retail price, exceeding $350 per customer, to HBJ, id. at 1429 and fn. 6.

After the conspiracy was initiated, HBJ discontinued selling a bar review course at retail in Georgia, and the price of the BRG course "skyrocketed" from $150 to over $400, id., at 1419, 1429. BRG did not attempt to sell a course in any other state and discontinued use of its own

copyrighted bar preparation material and many of its former lecturers. Law students who purchased the course after the price escalation filed a class action antitrust suit against the defendants in early 1982, id., at 1430. In October, 1982, while that case was pending, defendants privately modified their written licensing agreement by deleting the covenants not to compete, the market allocation clause, and the exclusive licensing clause, id. at 1430; the 1982 written contract modification, however, retained the exclusive trademark provision and the revenue-sharing provision, id.

Notwithstanding the 1982 contract modifications, which were revealed in 1984 when the first lawsuit was settled, the defendants' non-competitive relationship remained unchanged, and HBJ did not resume

retail sales in Georgia or license any other seller of its bar review materials or trademark in Georgia, id. at 1430. In 1985, after the initial lawsuit was settled, the price of BRG's course, sold now under the Bar/Bri tradename without competition from any other comprehensive bar review course, "escalated to approximately $825," id. at 1430; the escalated revenues were shared with HBJ, pursuant to the licensing contract, and there was no significant reduction in sales, id. at 1438, 1440-41. BRG controlled 95% of the market for all bar preparation material in Athens and northeast Georgia in 1985-86, according to another market survey, id., 1440.

The plaintiffs in the instant case filed an antitrust class action against the defendants on November 4, 1985,

seeking to represent consumers in Athens who purchased a course after June, 1984 and who were not included in the settlement of the first case. They alleged a continuing conspiracy between BRG and HBJ, initiated in 1980, to raise price, allocate markets, refuse to deal with independent suppliers (boycott), and monopolize the Athens submarket, Georgia market, and (with respect to HBJ), the national market for comprehensive bar review courses, pursuant to Sections One and Two of the Sherman Act, 15 U.S.C. 1 and 2. They also alleged unilateral monopolization and attempts to monopolize the Georgia retail and wholesale markets by BRG and HBJ, respectively, seeking damages and injunctive relief, pursuant to 15 U.S.C. §§ 13, 26.

The District Court issued Orders in

January and July, 1987 denying class certification and denying plaintiffs' motion for partial summary judgment on liability for per se violations of Section One of the Sherman Act. The Court's two Orders also granted defendants' Motions for Summary Judgment on all counts. App. C and D. On June 7, 1989, the Court of Appeals affirmed the decisions granting summary judgment, with Judge Clark filing a lengthy dissent, App. A. The plaintiffs then filed a petition for rehearing and suggestion of rehearing en banc on June 27, 1989. The U.S. Department of Justice moved for permission to file and then filed, on June 30, 1989, a brief amicus curiae supporting plaintiffs' request for rehearing en banc, App. F. That amicus brief, on behalf of the United States, stated that, "the panel's decision

threatens proper antitrust enforcement by wrongly limiting the doctrine of per se illegality as applied to market allocation agreements," amicus brief, pg. 1.

On January 26, 1990, seven months later, counsel for plaintiffs submitted to the Court's attention by letter this Court's decision, dated January 22, 1990, in Federal Trade Commission v. Superior Court Trial Lawyers' Association, 110 S.Ct. 768 (1990). On January 29, 1990, the Court issued an Order amending its June 7 Opinion by adding a paragraph and otherwise denying the petition for rehearing and suggestion of en banc rehearing, without mentioning Superior Court Trial Lawyers' Association, supra, App. B. Judge Clark adhered to his dissent. On February 1, 1990, plaintiffs moved, pursuant to Eleventh Circuit Rule

41-1, to stay and/or recall the Court's mandate seeking a poll of the full Court on the suggestion of en banc rehearing. That motion was denied by Order dated February 28, 1990, which also denied plaintiffs' request to cite supplemental authority.

This petition follows within 90 days of the January 29, 1990 Order.

The panel majority's Opinion contains several explicit holdings relevant to the questions presented by this petition. Each of those holdings is subject to an express dissent by Judge Clark. With respect to plaintiffs' claims that defendants had, in 1980, entered into a per se illegal conspiracy to fix prices and allocate markets, evidenced by the subsequent 1980 written contract, and which continued notwithstanding the 1982

modification of the written contract, the majority upheld a finding that defendants' agreement did not constitute price-fixing or market allocation: the conspiracy was "not a classic form of price-fixing where two competitors agreed what price they would charge for their products . . . ," id. at 1424; moreover, the conspiracy did not constitute a situation "where competitors divided up a market in which both were doing business, each taking a portion of the market," id., at 1424. Judge Clark, in dissent, wrote that, "It is clear that a horizontal price-fixing violation does not require that the defendants literally fix prices," id., at 1434. Judge Clark also wrote that, "The Court . . . made an erroneous legal distinction between the terms 'divide' and 'allocate.' Well-established case law

demonstrates that the allocation of markets or sub-markets by competitors is a per se antitrust violation," id., at 1433.

The panel majority also held, in response to plaintiffs' alternative Section One "rule of reason" and Section Two "conspiracy to monopolize" claims, that the "appellants may only prevail by demonstrating that BRG's and HBJ's arrangement had an anticompetitive effect in relevant geographic and product markets," id., at 1424, and that "proof of relevant product and geographic market is absolutely essential to appellants' Section Two claims," id., at 1426, 1427, thereafter concluding that plaintiffs' uncontradicted evidence had not adequately defined the relevant market or sub-market. In dissent, Judge Clark wrote, "Although

the rule of reason will often require a careful balancing of a challenged restraint's harms, benefits, and alternatives, a court can readily condemn a challenged restraint on summary judgment when the restraint directly limits competition on price or output and has no procompetitive justification," id., at 1436. If defendants' agreement were naked, or if plaintiffs proved "actual detrimental effects," then "plaintiffs would not have to define a relevant market or show market power." Judge Clark concluded that plaintiffs' evidence met both tests for proving unreasonableness. Id., at 1437.

The panel majority furthermore held that "antitrust law limits the range of permissible inferences from ambiguous evidence in a Sherman Act Section One

case. Conduct as consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy [citations omitted]. To survive [defendants'] motion for summary judgment, the appellants must present evidence tending to exclude the possibility that BRG and HBJ acted independently," id., at 1422. By contrast, Judge Clark's "disagreement with the majority begins with its adoption of an improper standard of review in this summary judgment action," id., at 1430. "It is therefore doubtful whether the standards announced in Matsushita and Monsanto apply in situations, such as this action, where the direct evidence of concerted action is manifest in explicit written agreements between dominant firms

allocating and monopolizing the market and interfering with independent price setting," id., at 1431.

Finally, in denying the petition for rehearing, the panel majority amended its Opinion by adding a paragraph, responding belatedly to the Justice Department's amicus brief. The majority added, "First, the [1982] agreement is not a 'naked agreement' between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors. HBJ's affidavit states that it is no longer a competitor in the Georgia market," App. B.

Although Judge Clark did not add anything to his dissent, his original dissent already had responded to the majority's post-hoc analysis. Judge Clark wrote, "HBJ and BRG's assertion that HBJ's 'withdrawal' from the Georgia market

somehow altered BRG's and HBJ's status as actual or potential competitors is disingenuous. Their argument would essentially nullify the per se rule because horizontal competitors could avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects. Instead, a Court must view an arrangement's economic substance rather than its form," id., at 1433. Judge Clark also wrote that, "the record is devoid of any evidence that the agreement between HBJ and BRG was ancillary or that it had some procompetitive, efficiency-creating potential," id., at 1435. The "1980 BRG-HBJ agreement is a blatant 'naked' restriction on output" . . . "plaintiffs must prevail because they have demonstrated actual detrimental effects,"

id., at 1437.

Perhaps the most serious disagreement between the majority and dissenting opinions, and the one least understandable to a putative plaintiff class of lawyers and law students, is the disparity in the descriptions of the contents of the record.

The majority held that, "As evidence of anti-competitive effect, the appellants offered the [1980] contract itself, the fact that the price went up after the parties signed the contract, and the affidavit of Leon van Gelderen . . . the appellants relied on an affidavit of Dr. William Henry, filed February 9, 1987, to address the issues of relevant product and relevant geographic market," id., at 1425. "The District Court also found that the entirety of the appellants' effort to

identify proper product and geographic markets was contained in the affidavit of Dr. William Henry," id., at 1427.

By contrast, Judge Clark recognized that defendants' list price not only increased from $150 to over $400 after the 1980 conspiracy was initiated, it continued to increase to $825 in 1985, id. at 1437. Moreover, the 1980 and 1982 agreements did specifically address the factor of price by including a $350 per course floor before revenue-sharing began, at a time when the list price was only $150, id. at 1435, 1438. Judge Clark also noted that the conspiracy "totally eliminated price and interbrand competition," id. at 1433, and precluded HBJ or any other potential licensee in Georgia from using the "Bar/Bri" tradename, id., at 1438. The conspiracy

totally eliminated consumer choice, as perceived by the consumers, and reduced output by shelving the previously utilized BRG copyrighted materials, id. at 1438.

Judge Clark wrote that, "the District Court discounted most of the plaintiffs' totally uncontested evidence" of relevant markets and monopoly power, id. at 1439. The majority similarly ignored the evidence. That evidence included a second, much longer affidavit of Dr. Henry, who analyzed information contained in four years of defendants' enrollment contracts and the relevance of transportation costs; the deposition and five-year market survey of Dr. David Kamerschen; the market survey, questionnaire responses, and affidavit of Professor Ponsoldt; the affidavits of three additional consumers and deposition

testimony of the plaintiffs and defendants; and defendants' comparative marketing literature and correspondence, id., at 1439-41. That evidence was uncontradicted. Defendants offered no expert testimony or market information. The majority provided no explanation for why it was ignoring the evidence described and cited in the dissenting Opinion.

REASONS FOR GRANTING THE PETITION

As Judge Clark recognized in dissent below, plaintiffs were entitled to prevail based upon any of several antitrust theories: the per se rule applied to price-fixing, the per se rule applied to market allocation, the Rule of Reason applied to naked restraints and/or where there are actual detrimental effects upon price or output, the rule of reason under

a traditional intrabrand/interbrand market power balancing test, and Section Two monopolization principles applied to the intentional dominance of relevant markets and submarkets as attested by three uncontested market evaluations and expert affidavits.

The Opinion of the panel majority conflicts with recent decisions of this Court and the Seventh, Fourth, Ninth, and Tenth Circuits, with the views of the Department of Justice, and with the Summary Judgment Rule. The Opinion would create serious enforcement problems and gaping loopholes in antitrust policy and would tolerate "disingenuous" evasions of law and continuing consumer injury: "the two principal competitors in the Georgia market have accomplished through their written agreement and subsequent actions

what the antitrust laws were designed to prevent: injury to the consumer," 874 F.2d at 1435, Clark, J., dissenting. That injury continues today, unabated, affecting current and future law students. Since the lower court affirmed summary judgment without addressing the adequacy of most of the record evidence those student-consumers perceive that the propriety of the lawsuit has never been resolved.[1]

I. THE PANEL MAJORITY'S UNDULY NARROW CONCEPTIONS OF "PRICE-FIXING" AND

[1] Judge Clark, in his dissent, also disagreed with the denial of class certification. In the event of remand to the District Court, Judge Clark is correct in believing the District court likely would reconsider the class certification issue. Otherwise, the complaint could be amended to add plaintiffs.

"MARKET ALLOCATION" SUBJECT TO PER SE CONDEMNATION ARE CONTRARY TO DECISIONS OF THIS COURT AND THE FOURTH CIRCUIT AND WOULD EVISCERATE PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, AS THE JUSTICE DEPARTMENT'S AMICUS BRIEF BELOW ARGUED.

The majority Opinion affirmed that an agreement between competitors to raise price is not per se illegal price-fixing unless it is "classic," "where two competitors agreed what price they would charge for their products," and prices are literally "fixed," 874 F.2d at 1424. That holding is contradicted by Superior Court Trial Lawyers' Association, supra, 110 S.Ct. 768, at 774, 775 (and cases cited therein): "Prior to the boycott, CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services . . . The agreement among the CJA lawyers was designed to obtain higher

prices for their services and was implemented by a concerted refusal to serve an important customer . . . 'This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price . . .' the horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output. [citation omitted]."

In the present case, HBJ and BRG agreed that HBJ would withhold its product from Georgia customers so that BRG could increase its price 300% overnight and share the increased price with HBJ. BRG further agreed not to initiate price competition against HBJ in any of the other 39 states in which HBJ did business so that HBJ could maintain its price level in those other states. In failing to

apply the "per se" rule to the defendants' conduct in the present case, but instead requiring proof of defendants' market power in a specifically defined market, the panel majority has transformed the per se rule into a rule of "'administrative convenience and efficiency,' not a statutory command," as this Court condemned in Superior Court Trial Lawyers, 110 S.Ct. at 780.

Even in the absence of the agreements not to compete and to share increased prices above $350 per customer in this case, and the resulting actual price escalation, defendants' concerted action would have been subject to the per se rule as horizontal market and customer allocation: "one of the classic examples of a per se violation of Section One is an agreement between competitors at the

same level of the market structure to allocate territories in order to minimize competition," United States v. Topco Associates, Inc., 405 U.S. 596, at 608 (1972). The panel majority restricted the per se rule, however, to agreements to "divide" pre-existing markets, 874 F.2d at 1424, which Judge Clark in dissent recognized to be incorrect, id., at 1433-34. Topco did not involve any agreement to increase and share price, nor did it involve a market "division." Rather, Topco involved purely an allocation of markets among potential competitors.

As Justice Scalia has written recently, "It may well be possible to envision some divisions of territory between competitors that do not, in the peculiar circumstances, reduce competition . . but such phenomena would be so rare that the

benefit of a rule prohobiting divisions of territory far exceeds the harm caused by overshooting sightly the precise congressional goal .... Such reduction of vague congressional commands into rules that are less than perfect fit is not a frustration of legislative intent because that is what courts have traditionally done and hence what Congress anticipates when is legislates,..." Scalia, "The Rule of Law As A Law of Rules," 56 U. Chi. L. Rev., 1175, 1183 (1989).

This Court should readily understand why the Justice Department was concerned with the Court's ruling: it would bar much criminal antitrust enforcement against bid-rigging and customer allocation, unless the defendants were proven to have market power in specific markets. In paradigm bid-rigging and

customer allocation cases, there is no agreement among existing competitors to rig bids for or "divide" existing customers, nor is there a literal agreement on price or proof of defendants' market power. See, e.g., United States v. Dynalectric Co., 859 F.2d 1559 (11th Cir. 1988) (affirming criminal conviction where contractors agreed not to compete for new customers but instead to enter into a "contractor-subcontractor" relationship and share profits).

The Justice Department, "primarily responsible for enforcing the federal antitrust laws and thus interested in the sound development of antitrust doctrine" (amicus brief, pg. 1), advised the en banc Court of Appeals, in support of en banc rehearing (which by local Rule is reserved for extraordinary cases): "Whatever the

merits of this antitrust case, concerning which the United States takes no position, the panel's limitation of the per se prohibition on market allocation by horizontal competitors to circumstances in which parties to the agreement divide between themselves a market in which both were doing and continue to do business is wrong as a matter of law, economics, and policy," amicus brief, pp. 2-3 (emphasis added).

The traditional application of the per se rule is as stated by the Fourth Circuit: "Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party . . . [is] per se violative of 15 U.S.C.," United States v. Portsmouth Paving Corp., 694 F.2d 312, 329 (4th Cir. 1982). See, most recently,

United States v. Suntar Roofing, Inc., _ F.2d __, 1990-1 CCH Trade Cases ¶68,936 (10th Cir. 1990) (an agreement between potential competitors to allocate customers is per se unlawful.)

In the present case the defendants, while competing directly, agreed that HBJ would withhold contract offers from Georgia customers and BRG would withhold contract offers from non-Georgia customers. The test for the per se rule applied in the present case conflicts directly with the paradigm test as applied by the Fourth and Tenth Circuits (and this Court) and would undermine antitrust enforcement, reducing the per se rule to a rule of "convenience" rather than a "statutory command," if allowed to stand by this Court.

In summary, by holding that price

fixing is per se illegal only when horizontal competitors fix a specific price, and by holding that market allocation is per se illegal only when horizontal competitors "divide," rather than "allocate" markets, the Eleventh Circuit is in direct conflict with long-standing antitrust principles stated in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940), and Topco, supra., and recently affirmed in Superior Court Trial Lawyers. The effect, as is clear from the Justice Department's amicus brief, will be to undermine civil and criminal antitrust enforcement.[2]

[2] On rehearing, the panel majority did not delete any of its initial Opinion, 893 F.2d 293, App. B. Instead, the majority added two brief characterizations to the record which, upon reflection, are remarkably "disingenuous" and "meritless," 874 F.2d at 1432, as Judge Clark previously had written in dissent. The Court wrote that:

the modified 1982 written contract, entered into secretly, two years into the ongoing conspiracy after the defendants had been sued, was "not a 'naked agreement' between competitors to allocate the market"; and, "HBJ and BRG are not horizontal competitors," because the terms of their continuing conspiracy required HBJ to withdraw from Georgia and have precluded competition, 893 F.2d 293.

Such an addendum contains a breathtaking invitation and blueprint for future antitrust violators.

As Judge Clark recognized, "their argument would essentially nullify the <u>per se</u> rule because horizontal competitors could avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects. Instead, a Court must view an arrangement's economic substance rather than its form," 874 F.2d 1433. Such a substantive basis for distinguishing "horizontal" from "vertical" restraints has been recognized by this Court at least since <u>United States v. Sealy, Inc.</u>, 388 U.S. 350 (1967), and <u>United States v. Topco Associates, Inc.</u>, 405 U.S. 596 (1972). In <u>Sealy</u> and <u>Topco</u> the plaintiff did not challenge the formation of the parent entity or its general licensing arrangements with its shareholders but instead challenged the market allocation terms of the initial and ongoing combination. In focusing only upon the "modified 1982 contract" in this case, therefore, the majority has addressed an issue that plaintiffs never raised and thereby condoned a transparent

II. THE PANEL MAJORITY'S REQUIREMENT THAT AN ANTITRUST PLAINTIFF NECESSARILY SUBMIT STRUCTURAL EVIDENCE TO PROVE SPECIFIC MARKET DEFINITIONS CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND THE SEVENTH, NINTH, AND TENTH CIRCUITS.

Despite this Court's decisions in <u>N.C.A.A. v. Board of Regents</u>, 468 U.S. 85 (1984), and <u>F.T.C. v. Indiana Federation of Dentists</u>, 476 U.S. 447 (1986), confusion apparently still exists in the lower courts concerning whether an antitrust plaintiff under the "Rule of Reason" necessarily must prove that the defendants control a dominant share of a

evasion of the antitrust laws.

Judge Clark correctly observed, however, that "the record is devoid of any evidence [or claim, or finding] that the agreement between HBJ and BRG was ancillary or that it had some procompetitive, efficiency-creating potential," 874 F.2d at 1435.

specifically-defined market. In N.C.A.A. this Court rejected N.C.A.A.'s claim that because television rights to intercollegiate football games was not specifically proven to be a relevant product market, N.C.A.A.'s restraint could not be deemed unreasonable. In Indiana Federation, this Court rejected the dentists' claim that because the F.T.C. had not adequately defined a relevant geographic market, the dentists' agreement not to provide X-rays to insurance companies could not be deemed unreasonable.

In the present case, the panel majority affirmed a holding that "appellants may only prevail by demonstrating that BRG's and HBJ's arrangement had an anticompetitive effect in relevant geographic and product markets," 874 F.2d

at 1424. The only basis stated by the majority for granting summary judgment with respect to plaintiffs' rule of reason claim, in fact, was the alleged lack of proof of relevant markets, id., at 1425, 1426, 1427.[3]

Although, as Judge Clark recognized in dissent, plaintiffs did, in fact, prove relevant markets and defendants' overwhelming market share through three categories of empirical evidence supported by three independent expert opinions, plaintiffs also proved unreasonableness

[3] In its caption on pg. 1426, labelled, "C. Sherman Act § 2 Analysis," the majority actually has confused "Rule of Reason" analysis with Section Two analysis. The Rule of Reason, of course, is relevant to Section One, not Section Two. The confusion in the Opinion is very telling: the panel literally transformed Section One into Section Two monopolization theory, and then disregarded plaintiffs' structural evidence.

by evidence of a 500% increase in defendants' list price, a reduction in output by the shelving of BRG's copyrighted material, and the total elimination of consumer choice and interbrand competition, as perceived by three sets of consumers. As Judge Clark recognized, consistant with this Court's opinions in N.C.A.A., and Indiana Federation, an agreement is unreasonable when it "directly limits competition on price or output and has no procompetitive justifications," or when it creates "actual detrimental effects," 874 F.2d at 1436, 37. The agreement in this case satisfied both tests, id.

The Seventh Circuit has just issued a decision interpreting the Rule of Reason which conflicts with the opinion below. The Seventh Circuit, relying upon and

quoting from Indiana Federation, has recognized that evidence of actual adverse effects on competition caused by a boycott was sufficient, even without specific proof of market definition, to establish the defendants' market power and the unreasonableness of defendants' conduct. Moreover, a showing of specific anticompetitive effects eliminated the need for any more specific inquiry into market definition, Wilk v. A.M.A., 895 F.2d 352 (Feb. 7, 1990): "The district court also relied on substantial evidence of adverse effects on competition caused by the boycott to establish the AMA's market power.... These findings eliminated the need for an inquiry into market power," 895 F.2d at 360. The holding in Wilk, which also upheld the District Court's market definition finding

based upon far less evidence than in the present case, cannot be reconciled with the majority opinion in this case.

The Ninth Circuit, in E.W. French & Sons, Inc. V. General Portland, Inc., 885 F.2d 1392 (1989), has held similarly that requiring an antitrust plaintiff to define the relevant market is too expensive and time-consuming when the evidence demonstrated the existence of concerted action whose purpose was to restrain price or output. See generally, 885 F.2d at 1404, 05 (Farris, J., concurring): "The crucial point is that neither market definition nor the traditional methods of market definition are essential to proving anticompetitive effect," id., at 1405.

The panel's separate holding in the instant case that defendants' market power in specifically defined markets must be

proven in connection with plaintiffs' conspiracy to monopolize claim is contradicted by a recent decision of the Tenth Circuit. In Monument Builders v. American Cemetery Association, 891 F.2d 1473 (10th Cir. 1989), the Court reversed the dismissal of a conspiracy to monopolize claim, holding specifically that, "'conspiring to monopolize is a separate offense under Section Two, requiring less in the way of proof than the other Section Two offenses [citation omitted] . . . . Market power in a relevant market need not be proved,'" 891 F.2d at 1484.

By contrast in the instant case, the panel affirmed the dismissal of plaintiffs' conspiracy to monopolize claim on the ground that, "proof of the relevant geographic and product market is essential

to all Section Two claims" . . . "the appellants' failure to properly identify relevant product and geographic markets required the District Court to grant summary judgment . . . on Counts V [conspiracy to monopolize] through VII," 874 F.2d at 1427, 1428. Judge Clark's dissent, id. at p. 1430, and fn. 32, recognizes that alleged lack of proof of market definition was the basis for the Court's decision, and that such a holding conflicts with recognized authority.

The decisions of the Seventh and Ninth Circuits limiting the plaintiff's burden in horizontal Rule of Reason cases, and the clear conflict between the Tenth and Eleventh Circuits regarding the necessary elements of a Section Two conspiracy case warrant the grant of certiorari to resolve the conflicts. The question of whether

or not an antitrust plaintiff must seek and introduce, and trial courts must demand, costly expert structural evidence in these categories of cases obviously is recurring and warrants attention.

III. THE UNEXPLAINED DISPARITY BETWEEN THE MAJORITY AND DISSENTING OPINIONS BELOW DESCRIBING THE CONTENTS OF THE SUMMARY JUDGMENT RECORD AND LEGAL STANDARD FOR SUMMARY JUDGMENT INDICATES THAT THE MAJORITY HAS DEPARTED FROM ACCEPTED JUDICIAL STANDARDS, WARRANTING THIS COURT'S SUPERVISION.

Rule 10.1(a) of the Rules of this Court provides, as a consideration for granting certiorari, that certiorari may be appropriate when a Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision." This is

such a case, for two reasons.

First of all, the panel below affirmed a summary judgment standard which is inapplicable to this case and in conflict with the Seventh Amendment, 874 F.2d at 1430. In his dissent, Judge Clark acknowledged this error. The majority held that "antitrust law limits the range of permissible inferences" which a plaintiff can rely upon to defeat summary judgment. Relying on Matsushita, the panel majority announced: "to survive a Motion for Summary Judgment, the appellants must present evidence tending to exclude the possibility" of innocent conduct, 874 F.2d at 1422. However, this Court's actual holding in Matsushita, 475 U.S. at 587, is quite different and much more specific. This Court in Matsushita held that an antitrust party has a more

stringent burden only when "the factual context renders [the non-moving parties'] claim implausible"; see also id., at 593. "Implausibility" according to Matsushita referred to the economic reasonableness of plaintiffs' claim and therefore the "genuineness" of the factual dispute -- that 20 competitors agreed to sustain losses from predatory pricing over a generation with the goal of eventually recouping those losses. By contrast, in this case, the "factual context" rendered plaintiffs' price-fixing and monopolization claims highly plausible. Evidence of a 500% price increase, in contrast to low prices over a long period of years in Matsushita, and two written contracts confirmed the plausibility of the claims. Moreover, there was no basis to "limit the range of permissible

inferences" to be drawn from plaintiffs' market definition evidence, which was uncontradicted.

Extending the Matsushita burden to antitrust plaintiffs in all antitrust cases, simply denies them a right to have a jury choose between conflicting possibilities or hypotheses -- one of innocence and one of guilt -- particularly when defendants have introduced no conflicting evidence other than general denials. In criminal cases, where the standard of proof is supposedly higher than in civil cases, "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt . . . ," United States v. Bell, 678 F.2d 547, 549 5th Cir. en banc, aff'd on other grounds, 462 U.S. 356

(1983).

The summary judgment standard applied by the panel thus imposes upon all antitrust civil action plaintiffs a greater burden to reach a jury than upon the government in criminal conspiracy cases to obtain a conviction. That result departs from the accepted course of judicial proceedings, founded upon the Seventh Amendment, that plaintiffs have a right to a jury trial to resolve disputed material facts or inferences.

The second reason that this Court's supervisory authority is warranted in this case concerns the huge disparity between the majority and dissenting opinions regarding the actual content of the summary judgment record, which may indicate an institutional failure of Eleventh Circuit practice. On review of

an Order granting summary judgment, a court of appeals must determine, de novo, whether the trial court was correct in concluding that the non-movant's evidence was insufficient to create a genuine dispute regarding material facts. In this case, the trial court held that plaintiffs' evidence of anticompetitive effects, continuing conspiracy, and market definition and power was insufficient to create any genuine factual dispute. However, as Judge Clark observed, "the District Court discounted [i.e. disregarded] most of the plaintiffs' totally uncontested evidence," 874 F.2d at 1439. An examination of the majority opinion reveals its recitation of the allegations in the appellate briefs and the opinions of the District Court, but no independent analysis of the

contents of the record or of governing law. The majority thus did not inquire whether the District Court's opinion accurately described the record or the law. By local Eleventh Circuit Rule, appeals are submitted without an appendix, based upon the original record, which is maintained in the Clerk's Office in Atlanta, Georgia, plus a very limited "Record Excerpts," Eleventh Circuit Rule 30-1.[4] The two Judges in the majority below are not located in Atlanta, whereas the dissenting Judge is located in Atlanta. The opinion of the dissenting Judge accurately describes the contents

[4] On petition for rehearing, plaintiffs requested permission to submit and then submitted a limited appendix to the panel. The panel's subsequent decision denying rehearing (App. B) did not refer to any of the evidence contained in the appendix.

of the record, at least in summary.

The evidence cited by the dissenting judge was in the record. That evidence includes three independent empirical studies of defendants' market share and market power, accompanied by three separate expert opinions, and defendants' own marketing literature and correspondence. As defendant BRG's price increased over 500% between 1980 and 1985, its sales and market share remained constant. The majority opinion disregards all of that uncontradicted evidence. The only explanation for such a deviation from the "accepted and usual course of judicial proceedings" is that the two judges in the majority never examined the original record in Atlanta. Thus, the disposition of this case below may reflect an ongoing institutional problem in the Eleventh

Circuit, particularly in summary judgment appeals, caused by that Court's preclusion of the submission of appendices on appeal, governed by Rule 30, F.R.App.P.

The dissenting opinion serves as a message to the putative class of plaintiffs -- Georgia law students, for whom the opinion below will serve as a teaching material -- that being correct on both the law and the facts is not always enough to prevail in Federal Court. This Court should exercise its supervisory authority to prevent the confirmation of such a message: "The trouble with the discretion-conferring approach to judicial law-making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected,

not only that the later case be different, but that it be seen to be so." (emphasis in original), Scalia, supra, 56 U. Chi. L. Rev. at 1178.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari to review the judgment of the Court of Appeals, as amended.

Respectfully submitted,

John C. Butters

John C. Butters
(Counsel of record)
P.O. Box 7129
Atlanta, GA 30357-0129
(404) 872-5693

Of Counsel:
James F. Ponsoldt
Professor of Law
University of Georgia
School of Law
Athens, GA 30602
(404) 542-5209

Counsel for Petitioners

APPENDICES

[APPENDIX A]

Jay PALMER, et al.,
Plaintiffs-Appellants,
v.
BRG OF GEORGIA, INC., a Georgia Corporation, d/b/a BAR/BRI, et al.,
Defendant-Appellees.

No. 87-8804.

United States Court of Appeals,
Eleventh Circuit.
June 7, 1989.

John C. Butters, Atlanta, Ga. and James Ponsoldt, Athens, Ga., for plaintiffs-appellants.

Trammell Newton, Hansell & Post and Kevin E. Grady, Alston & Bird, Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court For the Northern District of Georgia.

Before HATCHETT and CLARK, Circuit Judges, and FITZPATRICK *, District Judge. (* Honorable Duross

Fitzpatrick. U.S. District Judge for the Middle District of Georgia, sitting by designation.)

HATCHETT, Circuit Judge:

In this action brought by former law students of the University of Georgia Law School against bar review companies, we affirm the district court's ruling that the bar review companies did not violate the Sherman Act.

FACTS

Appellants, all 1985 graduates of the University of Georgia Law School in Athens, Georgia, brought this antitrust action against BRG of Georgia, Inc. (BRG), a Georgia corporation, Ronald O. Pelletier, BRG's owner, and Harcourt Brace Jovanovich legal and Professional Publications, Inc. (HBJ), a Delaware

corporation.[1] The appellants took a bar review course offered by BRG during January and February of 1985 in preparation for the Georgia bar examination.

In 1979, BRG offered a bar review course which covered the federal multi-state and Georgia law components of the Georgia bar exam. The BRG course included written materials plus lawyers and professors' live and videotaped lectures.

In 1979, BRG used West Publishing Company's (West) free standardized

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[1]. BRG includes Bar Review Group. Inc. and BRG publications, Inc., all Georgia corporations. Pelletier formed BRG in 1979 for the sole purpose of offering bar review courses to Georgia bar applicants.

multi-state materials which were being test marketed. BRG offered its bar review course at a lower price than it would have charged otherwise due to the availability of the free multi-state materials.

In 1973, HBJ began offering a review course for the Georgia bar exam and has offered bar review courses arid materials nationwide under the trade name "Bar/Bri." The record does not contain a precise description of HBJ's Georgia course, but the parties state that it is similar to the format of the BRG course. HBJ developed its own standardized multi-state materials and sold these as a part of its Georgia course.

In 1979, BRG and HBJ competed in Georgia. In response to the low price of BRG's course, HBJ reduced the price of

its Georgia course and lost money as a result. Richard Conviser, chairman of HBJ's board of directors, states in his affidavit that HBJ lost $45,000 on revenues of $120,000 without accounting for overhead.

At some point in 1979, West informed BRG that it planned to sell its multi-state materials through book stores, thus ending the test market arrangement. At about the same time, the lawyer who had been in charge of conducting HBJ's Georgia course suffered a heart attack. Conviser's affidavit states that HBJ decided to withdraw from the Georgia market at this time, but no documentation of this decision has been offered.

Conviser met with Pelletier in early 1980. On April 22, 1980, BRG and HBJ

entered into a written agreement which gave BRG an exclusive license to use HBJ's name "Bar/Bri" in Georgia. HBJ agreed that it would no longer offer a bar review course in Georgia and that it would not compete with BRG in Georgia. BRG agreed not to compete with HBJ outside of Georgia.

Immediately after execution of the 1980 agreement, the price of BRG's course rose from $150 to over $400. The record does not disclose what prices HBJ or other companies were charging for similar bar review courses. In February, 1982, a group of Georgia law students brought a class action lawsuit against BRG and HBJ alleging identical antitrust violations as are alleged in this case. See Edwards, et al. v. BRG of Georgia, Inc., et at., Middle District of Georgia, Circuit A,

No. 82-13th. The class included those students taking BRG's course between April 22, 1980 and June 15, 1981. By offering partial refunds to the class members, BRG and HBJ settled that class.

During the pendency of the 1982 class action, BRG and HBJ executed a modified agreement. In this modified agreement, HBJ withdrew BRG's exclusive right to market HBJ's multi-state materials in Georgia. However, BRG retained the exclusive right to use "Bar/Bri" in connection with its course. Also, the modified agreement dropped the express covenant not to compete which had been contained in the initial agreement. Since the execution of the 1982 agreement, HBJ has not competed with BRG in Georgia nor licensed its multi-state materials for use by any other Georgia

bar review course.

In 1979, the majority of University ot Georgia law students who used a bar review course conducted in Athens, Georgia, took either the HBJ or the BRG courses. The record contains no similar data for subsequent years. The BRG course is currently marketed statewide, and is conducted at various locations in Georgia, including Athens and Atlanta. Other bar review courses are offered to Georgia bar applicants, namely, the "NORD" and "PMBR"
-courses, but these are not described in the record.

PROCEDURAL HISTORY

The appellants sought to represent a class consisting of those law students who attended a BRG course in Athens,

Georgia, between June 15, 1984, and the present.
ing identical antitrust violations as are
al- Counts I through IV each alleges
section 1
violations of the Sherman Act, 15 U.S.C.A. § 1.[2] A different theory of per se liability was advanced under each of these counts, namely, price-fixing cartel (Count I); market and customer allocation (Count II); boycott and concerted refusal to deal (Count III); and unreasonable joint venture (Count

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[2]. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ..."

IV).[3] Counts V through IX of the complaint each alleged section 2 violations of the Sherman Act, 15 U.S.C.A. § 2.[4] The allegations were: conspiracy to monopolize in Georgia (Count V); attempt to monopolize in Georgia (Count VI); monopoly in Georgia

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[3]. The district court noted that these theories were improperly pled as separate counts because the plaintiffs only have one cause of action for an alleged section 1 violation of the Sherman Act. However, for ease of reference, the district court referred to the designations chosen by plaintiffs.

[4]. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolized or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed [to have violated this Act]

(Count VII); conspiracy. to monopolize nationwide (Count VIII); and attempt to monopolize nationwide (Count IX).

BRG and HBJ answered denying liability and denying that the class described by the appellants could be properly certified. On February 7, 1986, appellants moved for class certification and later moved for partial summary judgment on one of the conspiracy counts of their complaint. On May 2, 1986, BRG and HBJ moved for summary judgment. Appellants subsequently filed a motion for Fed.R.Civ.P. 11 sanctions against Pelletier.

On January 9, 1987, the district court denied appellants' motion for summary judgment, but granted BRG's and HBJ's motion for summary judgment as to Counts II through IX of the complaint,

and deferred ruling on Count I. The district court found that BRG Publications Inc.
and Bar Review Group, Inc. were related corporations which have been defunct at relevant times and had no involvement in any allegedly anti-competitive activities. The district court granted summary judgment to BRG Publications, Inc. and Bar Review Group. on all counts. In separate orders, the district court also denied appellants' motions for class certification and Rule 11 sanctions.

On February 9, 1987, appellants filed a Motion for Reconsideration of the January 9 rulings, and a memorandum responding to the district court's invitation to produce evidence to support a section 1 "rule of reason violation" of the Sherman Act. The district court

declined to reconsider its previous rulings, held that the appellants had failed to support a rule of reason violation, and granted BRG's and HBJ's motion for summary judgment on Count I. On July 16, 1987, the district court entered judgment. Appellants filed a motion to alter or amend the judgment, and the district court denied that motion. Appellants then filed a timely notice of appeal.

ISSUES

The appellants raise five issues on appeal:

1) whether the district court's determination that the appellants "may lack financial commitment" to this consumer class action constitutes a proper legal standard;

2) whether the district court abused

its discretion in denying a motion for sanctions against Pelletier;

3) whether the district court erred in granting BRC and HBJ summary judgment;

4) whether evidence that BAG's and HBJ's combination enabled them to: increase price 800-percent; reduce output; and eliminate consumer choice for a product uniformly perceived to be indispensable, is sufficient proof of anticompetitive effect to preclude summary judgment under section 2 of the Sherman Act; and

5) whether the district court erred in granting BRG and HBJ summary judgment when the appellants produced sufficient probative evidence from which a jury could have reasonably inferred that any relevant product and geographic market

existed; monopoly power existed or was dangerously likely to exist in that claimed market; and that BRG and HBJ took actions to secure or intended to secure such monopoly power as required for appellants to establish a violation of section 2 of the Sherman Antitrust Act.

DISCUSSION

I. Consumer Class Certification

[1] The appellants contend that the district court applied an erroneous legal standard in applying Fed.R.Civ.P. 23(a)(4) and misread the record in denying their motion for class certification. Citing Kirkpatrick et al v. Bradford et at., 827 F.2d 718 (11th Cir.1987), the appellants argue that consumer class certification should not be denied because of a lack of subjective

interest on the part of the named plaintiffs, unless their participation is so minimal that they virtually have abdicated the conduct of their case to their lawyer.

BRG and HBJ cite Kirkpatrick to argue that the adequacy of class representation under Fed.R.Civ.P. 23(a) is primarily a factual issue best left for the district court's determination. They argue that the trial court's denial of certification should be upheld absent an abuse of discretion. BRG and HBJ further argue that the individual appellants had little knowledge of the class action when deposed, and that the named appellants were unaware of the extent of their obligation to pay expenses. Thus BRG and HBJ assert that the record demonstrates the appellants'

lack of involvement and unwillingness to finance the case.

Whether a lawsuit may proceed as a class action is committed to the sound discretion of the district court, and its determination will not be overturned absent a showing that it has abused its discretion. In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1543-44 (11th Cir. 1987). The general rule provides that the district court's class certification is final unless an abuse of discretion exists, or the court has applied impermissible legal criteria or standards. Lawter v. Alexander, 698 F.2d 439, 441 (11th Cir.1983).

The district court held:

> At this juncture, plaintiffs only state that they are only capable of

assuming the cost of mailing notice to approximately 280 absent class members.

Rule 23(a), Fed.R.Civ.P. requires that parties seeking to represent a class demonstrate that they will adequately protect the interest of the class. Because plaintiffs may lack financial commitment sufficient for adequate investigation and trial preparation in light of the court's ruling, the court finds that certification of the class would be improper at this juncture. Accordingly, the motion for class certification is hereby denied.

We hold that the district court did not abuse its discretion, nor apply impermissible legal criteria or standards

in denying the appellants' request for class certification. At the point where certification be came important, the district court had granted BRG's and HBJ's motion for summary judgment on all counts except one. The district court allowed the appellants thirty days to establish a rule of reason claim under Count I, because it had rejected their claims on per se liability. The district court properly exercised its discretion in denying the class certification because the court expected the rule of reason development to require a greater degree of financial commitment than the appellants' depositions reflected they possessed. Accordingly, the district court's denial of consumer class certification is affirmed.

II. Fed.R.Civ.P. 11 Sanctions

[2] The appellants established that Pelletier submitted a false affidavit. BRG and HBJ first entered into a licensing agreement in April, 1980. Paragraph 27 of that agreement provided:

Because HBJ is providing its skill, expertise and special methods to Pelletier and BRG, if either Pelletier or BRG desires to conduct a bar review examination course in any state other than Georgia, it shall first offer HBJ the opportunity to license its courses and materials on the same terms and conditions as contained herein. Because HBJ or its licensees already conduct courses in certain states, BRG and Pelletier agree: (1) not to request a license from HBJ for such states; and (2) they will not directly or indirectly own, manage, operate, join, invest, control or

participate in or be connected as an officer, employee, partner, director, independent contractor or otherwise, with any business which is operating or participating in the preparation of candidates in a state in which HBJ or its licensee is then operating a bar examination review course. Those certain states in which HBJ or its licensees are presently operating is attached hereto as Exhibit "A".

Mr. Pelletier's affidavit states in paragraphs 3:

At no time have I ever agreed with Harcourt Brace Jovanovich legal Publications, Inc. ("HBJ Legal"), or Richard Conviser, or any agent or employee of HBJ Legal concerning:

a) the prices BRG would

charge for bar review courses;

b) where BRG would offer courses or not offer courses;

or

c) hiring only lecturers made available by HBJ Legal.

The appellants argued that Pelletier committed perjury in paragraph 3(b) of his affidavit and thereby violated Fed.R.Civ.P. 11[5] warranting sanctions.

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[5]. Fed.R.Civ.P. 11 provides, in pertinent part: If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the Person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The district court found that the alleged inconsistency between the two statements did not establish perjury, and denied the motion for sanctions.

The appellants contend that Rule 11 sanctions are mandatory, not discretionary. BRG and HBJ contend that the district court properly denied the appellants' motion for sanctions and correctly ruled that no evidence in the record established that Pelletier had committed perjury. BRG and HBJ further argue that the district court did not abuse its discretion in denying the appellants' Rule 11 motion for sanctions.

Although the district court found that Pelletier submitted a false affidavit, the district court did not impose Rule 11 sanctions because it could not determine whether Pelletier was

guilty of perjury, that is, whether his untrue statements were intentional. In reviewing the record, we find that the district court did not abuse its discretion in denying the appellants' motion for Rule 11 sanctions. See Donaldson v. Clark, 819 F.2d 1551 (11th Cir.1987). Accordingly, we affirm the district court's denial of Rule 11 sanctions.

III. Summary Judgment on Antitrust Claims

A. Standard of Review

Appellate review of the granting of a motion for summary judgment questions whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c). When reviewing a summary judgment decision, the reviewing court is bound by the same legal standards as those that control the district court in determining whether

summary judgment is appropriate. Amey Inc. v. Gulf Abstract & Title Inc., 758 F.2d 1486, 1502 (11th Cir.1985), cert. denied 475 U.S. 1107, 106 S.Ct. 1513, 80 L.Ed.2d 912 (1986).

To survive BRG's and HBJ's motion for summary judgment, the appellants must establish a genuine issue of material fact as to whether BRG and HBJ entered into an illegal conspiracy that caused the appellants to suffer a cognizable injury. Fed.R. Civ.P. 56(e). This showing has two components: first, the appellants must show more than a conspiracy in violation of the antitrust laws existed; they must show an injury to them resulting from the illegal conduct; second, the issue of fact must be genuine. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574,

585-86, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); Fed.R.Civ.P. 56(c), (e).

When BRG and HBJ carry their burden under Fed.R.Civ.P. 56(c), the appellants must do more than simply show some metaphysical doubt as to the material facts. The appellants must come forward with specific facts demonstrating a genuine issue for trial. Rule 56(e). Where the record, taken as a whole, does not lead a rational trier of fact to find for the appellants, no genuine issue for trial exists. Matsushita, 475 U.S. at 586-87, 106 S.Ct. at 1356; Dunnivant v. Bi-State Auto Parts 851 F.2d 1575, 1579-80 (11th Cir. 1988).

[3] In reviewing a grant of summary judgment, the inferences to be drawn from the underlying facts must be viewed in

the light most favorable to the non-moving party. But antitrust law limits the range of permissible inferences from ambiguous evidence in a Sherman Act section 1 case. Conduct as consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Matsushita, 475 U.S. at 587-88, 106 S.Ct. at 1356-57; Dunnivant, 851 F.2d at 1579-80.

To survive BRG's and HBJ's motion for summary judgment, the appellants must present evidence tending to exclude the possibility that BRG and HBJ acted independently. The appellants must demonstrate that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not

have harmed them. Matsushita, 475 U.S. at 588, 106 S.Ct. at 1357; Dunnivant, 851 F.2d at 1579-80.

In evaluating the appellants' per se liability claims under section 1 of the Sherman Act, the district court found that generally, a plaintiff asserting a section 1 claim must prove that the defendant's acts or conduct had an anti-competitive effect in relevant geographic and product markets. See Standard Oil Co. v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). Thus, the appellants bore the burden of proof and were required to make a factual showing in support of these elements when BRG and HBJ moved for summary judgment, See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The district court observed that

where a defendant's complained of acts and conduct fit certain judicially recognized categories, the plaintiffs need not establish that the defendants' conduct actually had an anti-competitive effect, nor establish the relevant product or geographic markets. Thus, the defendant is per se liable for any damages suffered by the plaintiff. The rationale is that the designated conduct is so inherently and reliably anti-competitive that its anti-competitive effects may be presumed.

B. Sherman Act § 1 Analysis

1. Per Se Violation

[4] Certain categories of concerted action which violate section 1 of the Sherman Act have been held to be per se illegal. Per se rules are appropriate only for conduct that is manifestly anti-

competitive, that is, conduct that would almost always tend to restrict competition and decrease output. See Business Electronics Corporation v. Sharp Electronics Corp.,
U.S. 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 cert. denied - U.S. 108 5. Ct. 1727, 100 L.Ed.2d 192 (1988). See also FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-59, 106 S.Ct. 2009, 2017- 18, 90 L.Ed.2d 445 (1986) (the Court has "been slow to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."); NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103- 04, 104 S.Ct. 2948, 2961, 82 L.Ed.2d 70 (1984) ("Per se rules are invoked when surrounding circumstances

make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct."); and National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978) (agreements are per se illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

The appellants contend that the district court erred in denying their motion for partial summary judgment based upon theories of per se liability under section 1 of the Sherman Act. The appellants argue that the existence of an agreement between HBJ and BRG providing for the withdrawal of HBJ from an

existing market and its refusal to bid for customers in that market (Georgia), in exchange for the agreement that BRG not sell in other markets or bid for customers in other markets, constitutes per se illegal market allocation and bid rigging. The appellants argue that the district court erroneously held this agreement not to constitute a per se illegal market or customer allocation agreement. The appellants further argue that an agreement between competitors to eliminate price competition and preclude future competition through the exchange of mutual covenants not to compete, coupled with a provision to share profits, constitutes per se illegal price fixing.

The appellants further argue that the district court's holding that BRG's

and HBJ's conduct does not constitute per se illegal price fixing because neither BRG nor HBJ agreed upon the price each would continue to charge for its product is erroneous. According to appellants, BRG's and HBJ's conduct is precisely the kind of combination to which the per se rule is intended to apply.

BRG and HBJ contend that the district court properly granted summary judgment because of the appellants' failure to present significant probative evidence indicating a violation of the antitrust laws. BRG and HBJ assert that they were in a vertical supplier-retailer relationship at the time of the first license agreement; had executed a second agreement; and have submitted affidavits that they were free to compete with each other.

The appellants seek to denominate the agreements and dealings between BRG and HBJ as arrangements of the type to which per se liability has been recognized, namely, price fixing, United States v. Socony-Vacuum Co., 310 Us 150, 60 S.Ct 811, 84 L.Ed. 1129 (1940); market and customer allocation, United States v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct 1126, 31 L.Ed.2d 515 (1972); boycott and concerted refusal to deal, Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 5. Ct. 703, 85 L.Ed. 949 (1941); and unreasonable joint venture, Citizens Publishing Co. v United States 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969).

[5] The district court found that the arrangement between BRG and HBJ did

not fit within any recognized category of per se liability. The district court further found that the 1982 agreement was not a classic form of price fixing where two competitors agreed what price they would charge for their products. On the contrary, the district court found that neither the 1980 nor the 1982 agreement explicitly addressed the factor of price, and that HBJ has never had any right under either agreement to be consulted about the price of the BRG course.] See Socony- Vacuum Oil Co. 310 U.S. 0, 60 S.Ct. 811. The district court also found that although the agreement of two competitors to "pool" their products may exert an upward influence of price, such an agreement is not inherently anti-competitive.

The district court found that

neither agreement between BRG and HBJ constituted the kind of market or customer allocation agreement which has been recognized as a basis for per se liability. See Topco 405 U.S. 596, 92 S.ct, 1126, The

district court found that this was not a situation where competitors divided up a market in which both were doing business, each taking a portion of the market. The district court also found that BRG had never done business outside the state of Georgia, that nothing in the record suggested that it ever intended to do so, and that HBJ has done business nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and HBJ. Thus, the district court found the only market ever claimed by both defendants was the state of

Georgia, which was not divided up under either the 1980 or 1982 agreements.

The district court ruled that BRG's and HBJ's conduct did not constitute a boycott or concerted refusal to deal. See Zenith Radio Corp v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). The district court rejected the appellants' attempt to invoke the per se theory based on the fact that the agreement prohibited BRG from hiring certain law lecturers because the appellant had no standing to raise that argument.

Finally, the district court found that the conduct described in the record differed from that recognized in Citizens Publishing Co., 394 U.S. 131, 89 S.Ct. 927 as an unreasonable joint venture which was per se illegal. The district

court found that BRG and HBJ did not pool capital, and HBJ had no risk of loss on the Georgia bar review course. Thus, the arrangement created was not a joint venture, and the Citizens Publishing theory is inapplicable.

The district court denied the appellant motion for partial summary judgment and granted summary judgment to the defendants on Counts II through IV The district court's analyses of these issues are thorough and legally sound. Accordingly, we affirm the district court's ruling that the appellants failed to establish per se liability under section 1 of the Sherman Act.

2 The Rule of Reason Violation

[6] Because no theory of per se liability applied to the appellants' claims under section 1 of the Sherman

Act, the appellants may only prevail by demonstrating that BRG's and HBJ's arrangement had an anti-competitive effect in relevant geographic and product markets. Whether the action violates section 1 of the Sherman Act is determined through case-by-case application of the rule of reason when the action is not per se illegal; the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Business Electronics, 108 5. Ct. at 1519.

The district court required the appellants to submit significant probative evidence that the 1980 agreement between BRG and HBJ, as modified in 1982, had an anti-competitive

effect in relevant product and geographic markets. As evidence of anti-competitive effect, the appellants offered the contract itself, the fact that the price went up after the parties signed the contract, and the affidavit of Leon Van Gelderen, a Georgia State School of Law graduate.

The appellants relied on an affidavit of Dr. William Henry, filed February 9, 1987, to address the issues of relevant product market and relevant geographic market. This affidavit stated that the relevant market is "comprehensive bar review courses that prepare students to take the Georgia bar examination" and that the relevant geographic market was "Athens, Georgia, during the winter academic term of law school."

The appellants contend that BRG's and HBJ's 1982 contract modification and subsequent pricing and noncompetitive conduct are evidence of a continuing horizontal conspiracy. The appellants argue that no material facts are genuinely disputed regarding Counts I and II of the complaint (price fixing and market allocation). They contest the district court's denial of their motion for partial summary judgment on liability for those counts. The appellants argue that the district court erroneously applied structural and temporal tests in granting BRG's and HBJ's motion for summary judgment on the appellants' section 1 rule of reason theory. The appellants further contend that their evidence was sufficient to create reasonably conflicting inferences

regarding the unreasonableness of BRG's and HBJ's conduct.

BRG and HBJ contend that the appellants failed to show any basis for a section 1 rule of reason violation. They argue that the appellants' rule of reason analysis suffers from its failure to specify exactly which agreement was unreasonable. BRG and HBJ contend that no significant probative evidence exists in the record from which a jury could reasonably infer that an unwritten agreement existed between BRG and HBJ not to compete against each other in selling bar review courses. BRG and HBJ argue that if the appellants are relying on this unwritten agreement, then the rule of reason analysis ends because no agreement exists to be evaluated.

The second possible agreement upon

which the appellants may have relied was the license agreement between HBJ and BRG when the appellants took their bar review courses. In this agreement, HBJ promised to supply bar review materials to BRG on a nonexclusive basis. The district court found that the license agreement did not contain any anti-competitive provisions. Thus, BRG and HBJ contend that the appellants' failure to prove the existence of an appropriate geographic and product market in which the effects of HBJ's agreement with BRG could be evaluated defeated their rule of reason claim.

In analyzing the appellants' rule of reason claim, the district court examined whether the appellants offered significant probative evidence that BRG's and HBJ's 1980 agreement as modified in

1982 had an anti-competitive effect in relevant geographic and product markets. The district court found that the possibility of anti-competitive effect existed in the contract between BRG and HBJ, which was amended in 1982, to make BRG's license nonexclusive and to delete the covenants not to compete, but that such effect cannot be presumed from the contract itself. The district court found that although the price of BRG's course went up significantly after the 1980 contract signing, this fact did not suffice to demonstrate anti-competitive effect, especially when the price increase came on the heels of West's withdrawal of the free multi-state materials. The district court found that it was as safe to assume that the price increase reflected these additional costs

as it was to assume that the higher prices were merely to gouge the customer. The district court found that the affidavit of Van Gelderen did not add significant evidence on the issue of anti-competitive effect.

Finding flaws in Dr. Henry's affidavit, the district court determined that it was not a substitute for expert product market analysis, and that the anti-competitive effect of the contract was more appropriately measured in a statewide market. The district court also ruled that "Athens, Georgia, during the winter academic term of law school" was not a relevant geographic market. The district court found that no significant probative evidence established that the modified contractual arrangement had a present anti-competitive effect in a

relevant product and geographic market. Accordingly, the court granted BRG's and HBJ's motion for summary judgment on Count I. In reviewing the district court analysis, we affirm.

C. Sherman Act § 2 Analysis

[7] In addressing Count V, conspiracy to monopolize in Georgia; Count VI, attempt to monopolize in Georgia; and Count VII, monopoly in Georgia, the district court examined the appellants' evidence of relevant product and geographic markets and monopoly power or dangerous probability of monopoly. This circuit has held that proof of relevant product and geographic market is absolutely essential to appellants' Section 2 claims." American Key Corp. v. Cole Nat. Corp, 762 F.2d 1569, 1579 (11th Cir.1985). Further, to prove an attempt

to monopolize (Count VI), an anti-trust plaintiff must prove the existence of "methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it ..." American Tobacco Co. v United States, 328 U.S. 781, 785, 814-15, 66 S.Ct. 1125, 1127, 1141-42, 90 L.Ed. 1575 (1946). To prove a claim of monopoly (Count VII), an antitrust plaintiff must prove monopoly power in the relevant market, that is, the power to control prices or exclude competition, United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).

The appellants contend that they did not have to prove that BRG's and HBJ's

combination had an anti-competitive effect in specifically defined product and geographic market, nor that a particular written contract has a present anti-competitive effect in order to establish the section 2 violation. The appellants argue that the structural standards for proof of unreasonableness contained in both the district court's January 9 and July 8 orders are wrong for three reasons: (1) that proof of specific product and geographic markets is not required in a horizontal rule of reason case to prove anti-competitive effect; (2) the evidence of an anti-competitive purpose alone, even with-out anticompetitive effects, would prove unreasonableness; and (3) evidence that prices were intended to and did "skyrocket," output was reduced, and

consumer choice eliminated is sufficient to prove a rule of reason violation.

Because the district court found that the appellants presented no significant probative evidence that the modified contractual arrangement between BRG and HBJ had a present anticompetitive effect in a relevant product and geographic market, the appellants have no foundation for a section 2 claim. Even so, the appellants argue that evidence of an 800-percent price increase without loss of sales or new entry, two market surveys and unopposed expert opinion showing that defendants control at least 93-percent of any relevant market, and a reduction in output and elimination of consumer choice are sufficient to prove an anti-competitive effect in a relevant product and geographic market. The

appellants argue that the district court transformed their rule of reason claim into a section 2 structural claim and then arbitrarily refused to acknowledge or consider their structural evidence.

The appellants further argue that the district court's conceptions of product market definition, geographic market definition, and anti-competitive effect are contrary to precedent. They assert that the court misread the complaint in reference to their charge of statewide market allocation, ignored a deposition, market survey, and BRG's and HBJ's enrollment contracts demonstrating increasing price without loss of sales statewide, and gave insufficient weight to other affidavits. The appellants also argue that BRG's and HBJ's product is perceived as unique by consumers, its

price is significantly higher than theoretical alternatives, and it has the distinctive properties and discreet vendors. They assert that every criteria for product market identification cited in Brown Shoe v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed. 2d 510 (1962) is satisfied by the record in this case. Thus, the appellants contend that BRG and HBJ took actions to secure, or intended to secure monopoly power in violation of section 2 of the Sherman Act.

BRG and HBJ argue that the authorities cited by the appellants have little to do with the kind, quantum, or quality of proof that a plaintiff must offer to show that an agreement in place between BRG and HBJ in 1985 violated the rule of reason. BRG and HBJ argue that the appellants are simply wrong in

suggesting that a restraint which is not per se illegal does not need to be evaluated within the context of a defined product and geographic market. BRG and HBJ contend that appellants' failure to establish the existence of a relevant product and geographic market thus defeats their section 2 claims.

BRG and HBJ argue that the appellants failed to produce sufficient evidence to avoid summary judgment on their theories with respect to monopolization of alleged Georgia markets. BRG and HBJ contend that the appellants failed to establish the

6. The affidavit states:

> Dr. William Henry, being duly sworn, deposes and says:

> 1.
>
> I am Professor of Finance in the College of Business Administration at Georgia State University with a Ph.D. degree in economics from North Carolina State University, and give this affidavit in the above-captioned matter.
>
> 2.
>
> I have reviewed the depositions of the plaintiffs in this action, the deposition of Ronald Pelletier, the enrollment contracts produced by the defendants, and the deposition of Professor David Kamershen taken in the case of

Edwards et al. v. BRG of Georgia, Inc., C.A. No. 82-13-Ath together with the exhibits thereto.

3.

structural elements of the relevant product or geographic market. BRG and HBJ further contend that the section 2 offenses of conspiracy, attempt, and actual monopolization all require the same proof with respect to the structural attributes of the economic market in which the violations are alleged to have taken place. To prevail, BRG and HBJ argue that the appellants must show: (1) the existence of some economically meaningful market, defined by its product and geographic characteristics, and (2)

the existence of monopoly power within the identified market. BRG and HBJ argue that the appellants failed on both accounts. Because the appellants failed to establish any significant probative evidence of conspiracy or agreement, BRG and HBJ contend that all section 2 theories must fail. Also, BRG and HBJ contend that no significant probative evidence has been produced from which a jury could reasonably infer that BRG and HBJ were parties in 1985 to an agreement to give BRG control over any Georgia market.

The district court held that proof of the relevant geographic and product market is essential to all section 2 claims. The district court found Dr. Henry's affidavit to be insufficient to

identify or justify a proper product or geographic market. The district court also found that the entirety of the appellants' effort to identify proper product and geographic markets was contained in the affidavit of Dr. William Henry, filed in opposition to BRG's and HBJ's motion for summary judgment.[6] The

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[6]. The affidavit states:

Dr. William Henry, being duly sworn, deposes and says:

1.

I am Professor of Finance in the College of Business Administration at Georgia State University with a Ph.D. degree in economics from North Carolina State University, and give this affidavit in the above-captioned matter.

2.

I have reviewed the depositions of the plaintiffs in this action, the deposition of Ronald Pelletier, the enrollment contracts produced by the defendants, and the deposition of Professor David

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Kamershen taken in the case of Edwards et al. v. BRG of Georgia, Inc., C.A. No. 82-13-Ath together with the exhibits thereto.

3.

Upon review of the depositions of the named plaintiffs and the deposition of Ronald Pelletier it is apparent that nearly all students at University of Georgia School of Law take the defendants' bar review course. Because the students taking the course are also enrolled as full-time students at the law school in Athens, it is not realistic to expect that they could reasonable [sic] take a course offered outside the Athens area. Further, Ronald Pelletier testified that defendants accounted for at least eighty percent of the sales of bar review courses in the Athens area.

I conclude that a comprehensive bar review course which includes lectures and written material offered in Athens, Georgia to prepare students to take the Georgia bar examination is the relevant product market and that Athens is a relevant geographic market

district court held Dr. Henry's affidavit insufficient to define the relevant product market. Particularly, because Dr. Henry chose to define the product market in such a narrow and seemingly artificial manner, the district court found that the lack of justification for his conclusions rendered it valueless. The district court held the relevant geographic market to be the geographic area of "effective competition" for the product in question. American Key Corp., 762 F.2d at 1581.

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for purposes of economic analysis. I further conclude that defendants have and have had the power to control prices in the market, and that defendants therefore have monopoly power in the relevant geographic and product markets.

This the 12th day of May, 1986.

/s/ William R. Henry

Dr. William Henry

Although the appellants' failure to properly identify relevant product and geographic markets required the district court to grant summary judgment to BRG and HBJ on Counts V through VII, the district court found that Count VI (attempt to monopolize in Georgia) and Count VII (monopoly in Georgia) would have failed for additional reasons. Count VI would have failed under the American Tobacco requirement, and Count VII would have failed under the Grinnell requirement. See supra p. 1426. The district court found that the appellants' only effort to show evidence of these requirements was the conclusory statements of the appellants that they had "no other choice" than the BRG course when they took it in January through February, 1984 in Athens, and the

statement in Dr. Henry's first affidavit that "[further, Ronald Pelletier testified that defendants accounted for at least eighty percent of the sales of bar review courses in the Athens

1. I concur in Part II of the majority opinion (upholding district court's denial of Rule 11 sanctions). I disagree, however, with the majority's conclusion in Part I that the district court's denial of class certification was not an abuse of discretion. The premise of the district court's order was that the plaintiffs "may lack financial commitment sufficient for adequate investigation and trial preparation in light of the court's ruling stating summary judgment on all

counts except the rule of reason claim]." The

area." The district court found that these assertions were "clearly insufficient."

CONCLUSION

Because of the district court's thorough, complete, and correct antitrust analysis regarding the appellants' claims and BRG's and HBJ's motions for summary judgment, we affirm.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

The majority concludes that the district court's analysis of the

procedural and substantive antitrust issues in this case is "thorough, complete, and correct." I dissent.[7]

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[7]. I concur in Part II of the majority opinion (upholding district court's denial of Rule 11 sanctions). I disagree, however, with the majority's conclusion in Part I that the district court's denial of class certification was not an abuse of discretion. The premise of the district court's order was that the plaintiffs "may lack financial commitment sufficient for adequate investigation and trial preparation in light of the court's ruling stating summary judgment on all counts except the rule of reason claim]." The record reflects that the plaintiffs' counsel was qualified and experienced, and prepared this case from its inception in a competent and professional manner. The plaintiffs' alleged lack of financial commitment was simply not a factor in their trial counsels' presentation of their case. I believe that the district court's misperceptions regarding the evidence necessary to establish the asserted antitrust violations,

I. Facts

The facts in this appeal are relatively simple. From 1976 to the present, defendants BRG of Georgia (BRG) and its owner Ronald Pelletier have offered a comprehensive bar review course in Georgia.[8] The course reviews both the multistate and Georgia portions of the Georgia bar exam through written materials and live and videotaped

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discussed infra, resulted in the court erroneously denying class certification based on the plaintiffs' purported "lack of financial commitment." I would therefore reverse the district court on this issue.

[8]. Prior to 1979, BRG's predecessor, defendant Bar Review Group, Inc., offered the bar review course in Georgia. During 1979, Pelletier formed two corporations: BRG of Georgia (BRG) and BRG Publications. For purposes of this opinion, references to the defendant BRG includes Pelletier as well.

lectures by attorneys and law professors. During 1979, BRG was utilizing free multistate materials that West Publishing Company was test marketing.

Harcourt Brace Jovanovich legal and Professional Publications (HBJ) sells comprehensive bar review courses in forty states and is the largest provider of bar review materials and lecture services in the country.[9] HBJ produces and uses its own multistate materials. HBJ began offering a Georgia review on a limited basis in 1976. During the period 1977-79,

[9]. HBJ originally retailed its bar review courses directly to consumers but has since modified its retailing strategy to include about 19 licensees who have the exclusive or non-exclusive right to provide HBJ bar review courses. HBJ does not concurrently offer its course at retail in competition with any of these licensees.

BRG competed directly with HBJ in the provision of comprehensive bar review courses in Georgia.[10] BRG and HBJ were the two dominant providers of bar review courses in Georgia at this time.

Beginning in 1979, BRG conducted an intensive advertising campaign against HBJ which HBJ alleges included false representations about the HBJ course. Vigorous price competition between BRG and HBJ resulted in driving the price of their bar review courses into the range of about $150 per student. The rivalry between BRG and HBJ was rancorous and vitriolic. Each accused the other of engaging in illegal tactics. According to

[10]. The review courses were administered in three cities, Atlanta, Athens, and Macon, where law schools were located.

Richard Conviser, head of HBJ's Legal and Professional Publications, HBJ incurred a loss of $45,000 on revenues of $120,000 in the 1979 price war. At some point during 1979, West Publishing decided to begin selling its multistate materials in bookstores; West therefore decided to charge BRG for the formerly free multistate materials.

Conviser asserts that HBJ unilaterally decided to withdraw from the Georgia market at some future unspecified date after sustaining the 1979 losses and following the death of the attorney who had operated HBJ bar review courses in Georgia. No documentation of this decision, however, exists. Conviser also asserts he was unaware of West's withdrawal of its free multistate materials from BRG at the time HBJ

purportedly decided to withdraw from Georgia.

In early 1980, Conviser and Pelletier got together during a time when BRG and HBJ were still selling bar review courses in Georgia.[11] Within a few months, they entered a written agreement on April 22, 1980 ("1980 agreement")

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11. Their first meeting was arranged by one of Conviser's attorneys in Chicago who had contacted Pelletier by phone. Conviser flew to Atlanta, Georgia and met Pelletier at the Coach & Six restaurant where they discussed in passing" the possibility of Bar/Bri purchasing BRG or BRG buying HBJ's Georgia operations. Record, Vol. 1. Tab 2, at 10-11. Pelletier later flew to Chicago where he and Conviser discussed a licensing arrangement or buyout. Id. Pelletier returned to Atlanta where a third meeting was held to discuss a possible licensing arrangement. Id.

which gave BRG the exclusive license to market HBJ's multistate materials in Georgia and the exclusive right to use the Bar/Bri tradename in Georgia. The agreement also contained a provision which required that HBJ not compete with BRG in Georgia and that BRG not compete with HBJ outside of Georgia.[12] Under the

[12]. The 1980 agreement contained two provisions one termed a "Covenant Not to Compete" and the other entitled "Other Ventures." Record, Vol. 2. Tab 13 at E10, E15. The former required HBJ not to directly or indirectly own, manage, operate, join, invest, control, or participate in or be connected as an officer, employee, partner, director, independent contractor or otherwise with any business which is operating or participating in the preparation of candidates for the Georgia State Bar Examination." Id at E10. The latter required BRG not to compete against HBJ in states in which HBJ currently operated outside the state of Georgia.

agreement, HBJ receives $100 per student enrolled and 40% of all revenues over $350. Soon after their agreement, BRG and HBJ announced in their advertising literature that because of their "combination, Bar/Bri Georgia students will, in essence, have the 'best of both worlds.'"

Immediately following the 1980 agreement, the price of BRG's course increased from about $150 to over $400. Law students who enrolled in the BRG course and paid the increased bar review course prices during the period April 22, 1980 to June 15, 1984, filed an antitrust suit against BRG, HBJ, Conviser, Pelletier, and others. This class action resulted in a settlement which provided

Id at E15.

class members with partial refunds. While the lawsuit was pending in 1982, BAG and HBJ modified their 1980 agreement by removing the express covenants not to compete and granting BRG the nonexclusive right to use Bar/Bri materials in Georgia ("1982 agreement"). BRG, however, retained the exclusive right to use the Bar/Bri tradename in conjunction with its bar review course in Georgia.

Despite these modifications, HBJ has not competed with BRG in Georgia and has not licensed its multistate materials for use by any other bar review course in Georgia. In addition, BRG has not competed against HBJ outside the Georgia market. The price of the BRG review course has continued to increase also. In 1985 the list price escalated to approximately $825. A group of law

students who enrolled in the BRG course in Athens, Georgia from June 15, 1984 to the present initiated this class action alleging that BRG, HBJ and Pelletier engaged in various antitrust violations.[13]

The law-student plaintiffs in this

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[13]. The nine count complaint alleges the defendants engaged in: (1) horizontal price-fixing; (2) graphic market allocations; (3) concerted refusals to deal; (4) an unreasonable joint venture; (5) a conspiracy to monopolize bar review written materials and lecture services in Georgia; (6) an attempt to monopolize bar review written materials and lecture services in Georgia; (7) monopolization of bar review written materials and lecture services in Georgia; (8) a conspiracy to monopolize bar review written materials and lecture services nationwide; and (9) an attempt to monopolize bar review written materials and lecture services nation-wide.

anti-trust action could prove that BRG and HBJ violated the antitrust laws in a number of ways. First, they could demonstrate that the 1980 agreement between BRG and HBJ was a per se violation of the antitrust laws and that the conspiratorial agreement continued despite the defendants' 1982 contractual modifications. Next, if the per se claims fail, they could demonstrate that the 1980 and modified 1982 agreements were unreasonable under the rule of reason. They could also establish that BRG and HBJ conspired to or attempted to monopolize, or succeeded in monopolizing, the

Georgia market for Georgia bar review courses.

The district court held that the 1980 agreement was not illegal under the

per se rule; it therefore did not decide whether the BRG-HBJ conspiracy continued. The district court also found that neither the 1980 agreement nor the modified 1982 agreement violated the rule of reason.[14]

II. Standard of Review

My disagreement with the majority begins with its adoption of an improper standard of review in this summary judgment action. In its recitation of the law on anti-trust summary judgment, the majority relies on Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475

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[14]. In its January 9, 1987 order the court granted the defendants' motion for summary judgment on counts 1-9. The court, however, permitted the plaintiffs to recast counts 1-4 under the rule of reason.

U.S. 574, 106 S.Ct 1348, 89 L.Ed.2d 538 (1986), a predatory pricing action. In Mataushita the Court held that in an action based on a predatory pricing theory "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Id. at 588, 106 S.Ct. at 1357. The plaintiff must therefore provide additional evidence demonstrating that the defendant's conduct was inconsistent with competition. Matsushita's holding is founded on the practical difficulties of differentiating between legitimate and illegitimate business practices (i.e. competitive pricing versus predatory pricing) when the plaintiff's asserted antitrust theory is speculative.

Matsushita is one of two recent Supreme Court decisions which have clarified the applicable standard of review in antitrust summary judgment actions which are based on speculative economic theories. See also Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (vertical price fixing action brought by a terminated distributor). Both Matsushita and Monsanto presented the Court with the difficult task of defining the proper evidentiary standard for determining under what factual circumstances an illegal antitrust conspiracy may be inferred from parallel conduct and other circumstantial evidence where direct evidence of conspiracy is

lacking.[15]

15. The common concern in Matsushita and Monsanto is that a court's denial of summary judgment based merely on speculative inferences from ambiguous evidence could deter or penalize perfectly legitimate and procompetitive conduct. Because legitimate price-cutting is the very essence of competition," allowing mistaken inferences" to result in antitrust liability chills "the very conduct the antitrust laws are designed to protect." Matsushita, 475 U.S. at 594, 106 S.Ct. at 1360 (citing Monsanto). The Supreme Court therefore adopted more exacting evidentiary standards to separate permissible procompetitive business practices from proscribed anticompetitive practices in antitrust actions based on business conduct that facially supports either practice. Consequently, both cases reinvigorated the use of summary judgment to summarily dismiss certain antitrust actions based on circumstantial evidence and speculative economic theories.

Both Matsushita and Monsanto, however, are distinguishable from the instant action. Neither case involved a consumer action based upon well-established horizontal per se and rule of reason theories where direct evidence establishes an explicit written agreement between two competitors allocating markets and interfering with independent price setting. Instead, the anti-trust claims in Matsushita and Monsanto relied on competitors' predatory pricing and vertical price maintenance theories, respectively, which antitrust scholars and judges have criticized for ensnaring legitimate business practices.[16] It is

16. Criticism of the broad application of predatory pricing theories abounds. See, e.g., R. Blair & D. Kaserman, Antitrust Econmics, 121-128 (1985) (predatory pricing may preserve or enhance, but cannot

therefore doubtful whether the standards announced in Matsushita and Monsanto apply in situations, such as the instant action, where the direct evidence of concerted action is manifest in explicit written agreements between dominant firms allocating and monopolizing the market

create, market power); R. Bork, The Antitrust Paradox: A Policy at War with Itself, 144-59 (1978) (debunking most predatory pricing theories); R. Posner, Antitrust Law: An Economic Perspective, 184-6 (1976) (narrowly limiting predation to practices designed to exclude an equally or more efficient competitor). Vertical price-fixing has also been severely critiqued. See, eg., R. Blair & D. Kaserman, Law and Economics of Vertical Integration and Control, I57-61 (1983) (law condemns vertical price maintenance despite potentially beneficial economic effects); R. Bork, supra, at 280-98 (virtually all vertical restraints benefit consumers and should be lawful).

and interfering with independent price setting. The 1980 BRG-HBJ agreement is a classic example of the most blatantly anticompetitive practices in which horizontal competitors can engage.[17] There is no credible scholarly debate that geographic market allocation and horizontal price-fixing between two dominant firms in an industry are legitimate procompetitive business practices. Thus, the substantive antitrust presumptions that controlled the Court's holding in Matsushita and Monsanto are inapplicable to these types of horizontal agreements whose pro-

17. Notably, the plaintiffs in this action allege a conspiracy between two corporations and their respective officers. This situation is unlike the predatory pricing scheme involving twenty-one defendants that the Supreme Court found implausible in Matsushita.

competitive virtues are minimal or nonexistent.

The standard of review in this summary judgment action is that announced in Celotex v. Catrett, 477 U.S. 317, 106 S.Ct 2548, 91 L.Ed.2d 265 (1986) and Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Under Fed.R. Civ.Proc. 56(c), this court must grant summary judgment for defendants if the plaintiffs "fail to make a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552-53 In determining whether the plaintiffs have met their burden, we must view all the evidence, and inferences drawn from such evidence, in the light

most favorable to the plaintiffs and resolve all justifiable inferences in their favor. Anderson, 477 U.S. 242, 253, 106 S.Ct 2505, 2513, 91 L.Ed.2d 202 (1986); Helicopter Support Systems v. Hughes Helicopter, Inc., 818 F.2d 1530, 1532 (11th Cir.1987). One particular piece of evidence, viewed in isolation, may not be sufficiently probative to justify sending a case to the jury; a review of all the evidence collectively, however, may justify such a result. In addition, we may not weigh conflicting evidence to resolve disputed factual issues. Instead, if a genuine issue of material fact exists, we must deny summary judgment. Helicopter Support Systems, 818 F.2d at 1532 (moving party has burden of demonstrating the absence of a genuine issue of material fact

viewing the evidence in the light most favorable to the non-moving party; "A court must deny summary judgment if reasonable minds could differ as to the factual inferences to be drawn from undisputed facts").

A thorough review of the entire record indicates that the plaintiffs have produced sufficient evidence to survive summary judgment on their price-fixing, market allocation, rule of reason, and monopolization claims under applicable Supreme Court precedents. Each of these claims relies upon well-established economic theories.[18] Further, they

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[18]. The plaintiffs' price-fixing and market allocation claims are the types that courts and economists have long condemned as per se violations of the Sherman Act. Their rule of reason and monopolization claims are similarly founded upon widely accepted economic principles.

support their claims with direct evidence of concerted action (including an explicit written agreement) that excludes the possibility of legitimate independent action. In addition, they have provided substantial expert economic analysis which demonstrates the adverse economic consequences of the defendants' conspiratorial agreement.

III. Per Se Claims

The district courts analysis of the plaintiffs' per se claims[19] contrary to

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[19]. Per Se rules are appropriate only for conduct which is manifestly anticompetitive and should be "invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103-04, 104 S.Ct. 2948, 2961, 82 L.Ed.2d 70 (1984).

well-established antitrust case law. Under binding Supreme Court precedent, the 1980 agreement between HBJ and BRG falls within one of two recognized per se categories: market allocation and price-fixing.[20] The district court, however, misapplied the proper test on both claims. In addition, there is sufficient evidence of an unlawful agreement and continuing conspiracy between the defendants to survive a summary judgment motion.

A. HBJ and BRG are Horizontal Competitors

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[20]. The Supreme Court has applied the per se rule to geographic market allocation and horizontal price-fixing because such practices are so plainly anticompetitive that no elaborate study of an industry is necessary to establish their illegality. National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978).

As an initial matter, HBJ and BRG argue that the plaintiffs' horizontal per se theories do not apply to them because they are in a vertical supplier/retailer relationship. They further urge that HBJ's asserted unilateral decision to withdraw from the Georgia market in early 1980 instantaneously transformed HBJ's relationship from a horizontal to vertical one thus precluding horizontal per se theories. These arguments, however, are simply disingenuous and meritless.

It is firmly established that entities in a seemingly vertical relationship may be capable of horizontal restraints if they are actual or potential competitors.[21] During the

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[21]. Abadir Co. v. First Mississippi Corp., 651 F.2d 422, 426-427 (5th Cir.Unit A July 1981) (competitors not

period 1976-1980, both HBJ and BRG were direct, fierce and antagonistic competitors in the Georgia bar review course market. Because the HBJ and BRG courses were separate and distinguishable brands of comprehensive bar review courses, BRG and HBJ were horizontal competitors engaging in inter-brand competition.[22] In addition, HBJ and BRG

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allowed to turn an otherwise horizontal agreement vertical by setting up a licensing corporation to impose market allocation agreements); see, e.g., U.S. v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972) (cooperative buying association which allocates territories violates horizontal per se rule); U.S. v. Sealy, Inc., 388 U.S. 350, 87 S.Ct. 1847, 1850, 18 L.Ed.2d 1238 (1967) (characterizing licensor-licensee relationship as horizontal where licensees own substantially all stock of licensor).

[22]. Agreements between horizontal competitors that affect inter-brand competition are the "primary concern of antitrust law." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.

have always been and continue to be at least potential competitors.[23] Simply stated, BRG and HBJ cannot have it both ways-either they are horizontal competitors because HBJ can reenter the Georgia marketplace and compete with BRG or they are co-conspirators acting in concert to prevent such competition between themselves.

Further, HBJ and BRG's assertion that HBJ's "withdrawal" from the Georgia market somehow altered BRG's and HBJ's status as actual or potential competitors is disingenuous. Their argument would

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19, 97 S.Ct. 2549, 2558 n. 19, 53 L.Ed.2d 568 (1977).

[23]. Both provide the same type of service, bar review courses, and both are capable of providing their services in the same geographic locations (absent their agreements).

essentially nullify the per se rule because horizontal competitors could avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects. Instead, a court must view an arrangement's economic substance rather than its form.

> The rationale for each per se rule is an economic analysis of the agreement, an analysis of the potential economic advantages which might motivate the parties to a particular type of agreement. A per se rule is applicable to a particular case if and only if the economic analysis which justifies the rule applies to the particular case.

Abadir & Co. v. First Mississippi Corp., 651 F.2d at 426. Given that HBJ vigorously competed and then joined forces with BRG following meetings between Pelletier and Conviser, the indisputable conclusion is that BRG and HBJ were, and continue to be, capable of engaging in per se horizontal restraints.

B. Market Allocation

The district court erroneously concluded that to prove a per se violation under a geographic market allocation theory the plaintiffs had to show that BRG and HBJ have subdivided some relevant market in which they previously competed.[24] Because BRG and

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[24]. The district court stated that:

> Neither agreement between BRG and [HBJ] constitutes the sort of market or customer allocation agreement which has been recognized as a basis of per se liability. Cf. Topco, 405 U.S. 596 [92 S.Ct. 1126]. This is not a situation where competitors divided up a market in which both have previously done business, each taking a portion of a market. BRG has never done business outside the state of Georgia, and nothing in the record suggests that it ever intended to do so. [HBJ1 as noted has done business virtually nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and [HBJ]. Thus, the only market ever claimed by both Defendants is the state of Georgia, and clearly the state of Georgia was not

HBJ did not divide the Georgia marketplace between themselves, the trial court reasoned that no Sherman section 1 violation occurred. The court, however, made an erroneous legal distinction between the terms "divide" and "allocate."

Well-established case law demonstrates that the allocation of markets or sub-markets by competitors is a per se antitrust violation. In United States v. Topco Associates, Inc,, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), the Supreme Court held that agreements between competitors to allocate territories to minimize

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divided up under either the 1980 or 1982 agreements.

Order, January 9, 1987 at 8 (emphasis added).

competition are per se unlawful:

> One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.... This Court has reiterated time and time again that "[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.

Id. at 608, 92 S.Ct at 1133-34 (emphasis added) (citations omitted). See also E. Sullivan & J. Harrison, Understanding Antitrust and Its Economic Implications, § 4.14 at 111 (1988) ("A horizontal market division is created when competitors agree not to compete in a designated market."). The defendants in Topco did not divide a market in which they had previously competed; they simply agreed to allocate markets. See also Gainesville Utilities v. Florida Power & Light Co., 573 F.2d 292, 299-300 (5th

Cir.1978) (horizontal market division per se violation), cert. denied, 439 U.S. 966, 99 S.Ct 454, 58 L.Ed.2d 424 (1978). Thus, market division is simply a subset of market allocation both of which are per se antitrust violations.[25]

In this action, HBJ and BRG allocated designated markets: BRG received the Georgia market while HBJ received the balance of the United States. Each agreed not to compete in the other's respective market. The district court therefore erred in failing to classify this market allocation agreement as a per se violation.

C. Price-Fixing Claim

[25]. To use the district court's parlance, BRG and HBJ divided the Georgia market by allocating 0% for HBJ and 100% for BRG and divided the national market by allocating 100% for HBJ and 0% for BRG.

The plaintiffs also claim that BRG and HBJ entered into their 1980 agreement with the primary purpose of eliminating price competition between themselves in the Georgia marketplace. They assert that the license fee and revenue-sharing agreement between BRG and HBJ is the mechanism that facilitates the defendants' purpose in raising the price of bar review courses and distributing the resulting profits. BRG and HBJ disavow any intent to restrain trade and claim that their agreement is "nothing more than an ordinary copyright royalty arrangement" which courts have "routinely sustained." The district court held there was no per se violation because the agreement neither explicitly set prices

nor was it inherently anticompetitive.[26]

The district court's analysis of the plaintiffs' price-fixing claim is incomplete in at least two important respects. FIrst, the fact that the agreement between the defendants did not explicitly address pricing and HBJ did not have the express right under the agreement to be consulted about the prices BRG charged for bar review

[26]. The district court held that:

> the agreement is not a classic form of price fixing where two competitors agree what price they will charge for their products. On the contrary, neither agreement explicitly addresses the factor of price, and [HBJ] has never had any right under either the 1980 or 1982 agreement to be consulted about the price of the BRG course. While it is true that the agreement of two competitors to "pool" their products may exert an upward influence on price, such an agreement is not inherently anticompetitive, and in a given setting could actually be procompetitive.

Order, January 9, 1987, at 7-8.

courses, does not exclude the possibility of a price-fixing violation. Second, the district court erred in finding that the revenue-sharing agreement was not inherently anticompetitive because the record establishes that the purpose and effect of the agreement was to increase the price of bar review courses.

It is clear that a horizontal price-fixing violation does not require that the defendants literally fix prices. Instead, "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84, L.Ed. 1129 (1940). For instance, price-fixing

results when competitors agree to some non-price restrictions that directly and adversely affect the market prices for their goods or services.[27] Such indirect methods of raising prices injure consumers as much as direct, overt price setting.

In contrast to such indirect methods, the combination of the defendants' licensing and revenue-sharing agreements has a direct upward effect on price because it requires BRG to set the price of its bar review course above $350

[27]. See, e.g., Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (horizontal agreement to terminate the practice of giving credit falls squarely within the traditional per se rule against price-fixing); National Society of Prof. Eng. v. U.S., 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (agreement that interferes with setting of price by free market forces is illegal on its face).

before revenue sharing begins. It also totally eliminates HBJ's incentive to compete with BRG in Georgia. First, HBJ has little incentive to compete with BRG because any resulting price competition would reduce HBJ's profits under the agreement's revenue-sharing provision. Second, BRG has the exclusive right to use the Bar/Bri tradename in Georgia thus precluding HBJ from using its own multistate materials and its own tradename. The combination of the licensing and revenue-sharing provisions have the effect of stifling competition and maintaining BRG's (and indirectly HBJ's) dominance in Georgia.

The second error in the district court's analysis relates to the possible justifications for the defendants' conduct. The district court correctly

noted that because some horizontal agreements have procompetitive potential, not all horizontal agreements among actual or potential competitors that have an impact on price are per se violations. For example, some joint ventures and other cooperative arrangements are not per se violations because an agreement on price is necessary to market the product.[28]

In determining whether a challenged practice is a per se violation or subject to a rule of reason, a court must inquire

[28]. See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 101, 104 S.Ct. 2948, 2960, 82 L.Ed.2d 70 (1984) (horizontal restraints on competition necessary if product is to be available); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 21-22, 99 S.Ct. 1551, 1563, 60 L.Ed.2d 1 (1979) (horizontal licensing arrangement created product which was "greater than the sum of its parts").

into whether the practice always or almost always tends to raise price and restrict output or instead is likely to assist the creation of economic efficiency. Rigid line drawing must be avoided and close attention given to procompetitive, efficiency-creating integration that is accomplished as the result of an outwardly anticompetitive, yet ancillary, restraint. National Bancard Corp. v. VISA, U.S.A., Inc., 779 F.2d 592 (11th Cir.1986), cert. denied, 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986).

Here, in contrast, the record is devoid of any evidence that the agreement between HBJ and BRG was ancillary or that it had some procompetitive, efficiency-creating potential. Furthermore, there is no evidence that it was necessary for HBJ

and BRG to combine their resources to provide a bar review course in Georgia particularly when they had competed for several years prior to their price war. The use of restrictive covenants in the 1980 agreement further buttresses the inference that the defendants' purpose in allocating the Georgia market was to reduce competition between themselves and ultimately to raise prices and reduce output.[29]

It is worth reiterating that the 1980 agreement totally eliminated price and inter-brand competition between HBJ and BRG in the Georgia market and there are no apparent economies of scale or

[29]. See Cititens Publishing Co. v. United States, 394 U.S. 131, 134-36, 89 S.Ct. 927, 928-29, 22 L.Ed.2d 148 (1969) (market allocation agreement designed to prevent commercial rivalry and support price fixing conspiracy).

other cost savings to counterbalance this anticompetitive result. HBJ could have sold its materials to BRG without entering such a blatantly anticompetitive agreement.[30] Instead, the two principal competitors in the Georgia market have accomplished through their written agreement and subsequent actions what the antitrust laws were designed to prevent: injury to the consumer.

The evidence establishes that the 1980 agreement between BRG and HBJ is per se illegal under binding Supreme Court prece-dent. The written agreement has the effect of reducing price competition in Georgia and markets into which BRG might have otherwise entered absent the agreement. The agreement also has no redeeming procompetitive virtues. Thus,

[30]. See infra note 31.

the trial court erred by too narrowly construing the rule against horizontal price fixing and should have condemned the defendants' agreement as being per se illegal.[31]

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[31]. Because the district court erred in finding that the 1980 agreement did not constitute a per se violation, it did not address whether the 1982 modified agreement constituted a withdrawal from or abandonment of the conspiracy. In United States v. 218 US. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), the Supreme Court held that antitrust conspiracies may continue in time beyond the original conspiratorial agreement until either the conspiracy's objectives are abandoned or succeed. Id. at 608-09, 31 S.Ct. at 126. For example, a conspiracy' continues so long as one or more conspirators continue to receive payments under a collusive contract because the conspirators continue to realize a central and obvious objective of the conspiracy (i.e. illicit profits). United States v. Dynalectric Co., 859 F.2d 1559, 1563-69 (11th Cir.1988); United States v. Aquafredda, 834 F.2d 915, 919 (11th Cir.1987) cert. denied sub nom., Agostino v. United State', -U.S.-, 108 S.Ct. 1278, 99, L.Ed.2d 489 (1988). In the absence of proof of withdrawal, the conspirators are presumed to continue in their conspiracy particularly where they continue to share

IV. Rule of Reason Claim

Although the 1980 agreement is a per se violation, the plaintiffs may also show that the 1980 agreement and its subsequent 1982 modifications violate the rule of reason. The district court found that neither the 1980 nor the reformulated 1982 agreements violated the rule of reason because the plaintiffs failed to demonstrate any actual anticompetitive effects. The district

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the fruits of their conspiracy, in this case through the revenue-sharing provision in the 1980 and 1982 agreements. Dynalectric, 859 F.2d at 1563-69; Aquafredda, 834 F.2d at 919 (antitrust defendants' continued sharing of revenues and professional and social affiliations permits inference of continued conspiracy). Thus, it is an unsettled factual issue whether the conspiratorial objectives manifest in the 1980 agreement between HBJ and BRG have continued despite the supposedly ameliorative modifications made in 1982.

court erred in its findings and also failed to apply the proper analysis under the rule of reason.

Under the rule of reason, a "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1978). Although the rule of reason will often require a careful balancing of a challenged restraint's harms, benefits, and alternatives, a court can readily condemn a challenged restraint on summary judgment when the restraint directly limits competition on price or output and has no procompetitive justification. P. Areeda, Antitrust Law ¶

1508, at 403 (1986); see also NCAA, 468 U.S. at 109, 104 S.Ct. at 2964. Under the rule of reason, a sliding scale has developed which permits antitrust plaintiffs to demonstrate a lower threshold level of anticompetitive effect the more egregious the defendants' challenged practice or restraint. A demonstration of anticompetitive effect or market power, however, may not be necessary in cases where the challenged restraints are sufficiently "naked" in the sense that they directly restrain price or output.

A. The Rule of Reason Under Indiana Federation of Dentists

Under the rule of reason as enunciated in FTC v. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct 2009,

90 L.Ed.2d 445 (1986),[32] the plaintiffs in this action can demonstrate an antitrust violation in one of two ways.

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[32]. In Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) a group of dentists decided to stop supplying x-rays of their patients' mouths to the insurance company paying the bill. The Supreme Court held that this practice is an illegal horizontal agreement that withheld from dental customers a particular service the customers desired. "Absent some countervailing procompetitive virtue-such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained under the Rule of Reason." 476 U.S. at 459, 106 S.Ct. at 2018 (citations omitted). Additionally, the Court reiterated that the FTC's absence of specific findings, regarding market definition and market power does not preclude, as a matter of law a finding that the dentists unlawfully restrained trade. Id. at 460, 106 S.Ct. at 2018-19. Instead, actual proof of detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power. Id. at 460-61, 106 S.Ct. at 2019.

The first requires that the plaintiffs demonstrate that the 1980 agreement between BRG and HBJ imposed a "naked" restriction on output or price; in this instance, the plaintiffs would not have to define a relevant market or show market power. BRG and HBJ, however, would have to provide a countervailing procompetitive virtue to avoid liability. Under the second method, if the agreement is not sufficiently "naked," the plaintiffs can show actual detrimental effects, such as a reduction of output or increased price, instead of an inquiry into market power.

B. BRG-HBJ Agreement is a "Naked" Restraint

Under the first method, the 1980 BRG-HBJ agreement is a blatant "naked" restriction on output because it

allocated markets and thus prevented HBJ from selling its bar review materials to any course provider other than BRG in the Georgia market. This along with the exclusive tradename provision perpetuated BRG's, and indirectly HBJ's, economic dominance in the Georgia bar review course market. The plaintiffs therefore did not have to provide evidence of a relevant market or market power to prevail on their claim. Instead, the burden shifted to defendants to provide evidence of some procompetitive efficiency-enhancing virtue to their agreement, which they failed to do. The district court erred in holding that the BRG-HBJ agreements were not presumptively anticompetitive under the rule of reason.

C. Anticompetitive Effects

Under the second method, the plaintiffs must prevail because they have demonstrated actual detrimental effects:[33] the price of bar review courses has increased dramatically with no sufficient cost-based explanation and BRG and HBJ's non-competition agreement has reduced consumer choice and reduced output.

The plaintiffs introduced evidence of a dramatic price increase which immediately followed the defendants' 1980 agreement. The district court rejected the conclusion that this price increase was an anticompetitive result of the

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[33]. Because they have shown anticompetitive effects, the plaintiffs would not have to establish a relevant market or that the defendants had market power.

defendants' agreement.[34] A review of the record, however, indicates that a genuine issue of material fact regarding actual and continuing anticompetitive effects exists thus precluding summary judgment for the defendants on the plaintiffs' rule of reason claims.[35]

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[34]. Instead, the district court held "it is as reasonable to assume that the price increase reflected [additional multistate] costs as it is to assume that the higher prices were merely to gouge the consumers." Order, July 8, 1987 at 5. The trial court also held that the plaintiffs failed to demonstrate that the defendants' modified contractual arrangement had a "present anticompetitive effect in a relevant geographic and product market." Order. July 8, 1987, at 7 (emphasis added).

[35]. Plaintiffs in a rule of reason case do not have to demonstrate a present anticompetitive effect in a specifically-defined product and geographic market if they can establish the existence of anticompetitive effects or purpose during the time period that the anticompetitive practices were allegedly in effect. These anticompetitive effects can be inferred from the price increases following the

1. Price Increases

The record indicates that the price of BRG's bar review course in Georgia has increased from $150 in 1979 to a list price of $825 in 1985. This increase in price is obviously detrimental to consumers of Georgia bar review courses yet the district court held that the increase does not necessarily establish anticompetitive effect because BRG's costs may have increased because West Publishing no longer made its free

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HBJ-BRG agreement (and the resulting reduction in the number of bar review courses sold), the licensing and revenue-sharing provisions, and the elimination of consumer choice through HBJ's withdrawal from the Georgia market.

multistate materials available.[36] The court's analysis, however, neglects the anticompetitive effects inherent in the defendants' licensing fee and revenue-sharing provisions contained in both the 1980 and 1982 agreements.

The district court is correct in concluding that the possibility of anticompetitive effect exists and that the price increase of BRG's bar review course may be attributable, in part, to the cost of multistate materials that BRG must now bear due to West Publishing's decision to charge for its previously

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36. The district court concluded that "[u]nder the circumstances, it is fair to conclude that the possibility of anticompetitive effect exists, but that such effect cannot he presumed from the contract itself." Order, July 8, 1987, at 4.

free materials.[37] These increased costs, of course, are increased revenues for HBJ. Under their agreements, BRG pays HBJ $100 per student enrolled and BRG and HBJ jointly share any price increases above $350. Thus, any price increase imposed

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37. An important factual issue is whether BRG's and HBJ's agreements are necessary for either's competitive survival. First, no evidence exists to explain why BRG had to use Bar/Bri's multistate materials much less have the exclusive right to the Bar/Bri tradename. Other sources of multistate materials existed. For instance, West Publishing's materials were still available albeit not free. Pelletier Deposition, at 73. Second, although HBJ would forego income by not selling its multistate materials to some other bar review course in Georgia, no legitimate reasons exist to explain why it was necessary for HBJ to form an agreement with its only rival in Georgia that contains blatantly anticompetitive licensing, revenue-sharing, and market allocation provisions. A plausible explanation is BRG's and HBJ's collective desire to profit by eliminating their rivalry and sharing the increased revenues that would result from BRG's new-found dominance in the Georgia market.

on BRG bar review consumers above $350 results in increased revenues to both BRG and HBJ. For instance, for each bar review course BRG sells at the 1985 list price of $825, HBJ receives $190 (40% of $475) plus the $100 per student licensing fee. At the $825 list price, HBJ receives a total of $290 per course sold while BRG receives the balance of $535 per course. The revenue-sharing provision, therefore, minimizes HBJ's incentive to compete with BRG because any resulting price competition would reduce HBJ's profits under the agreement. Similarly, the revenue-sharing provision also minimizes HBJ's incentive to license its multistate materials to other bar review courses in Georgia because such courses would compete with BRG and further reduce HBJ's profits.

Thus, it is a disputed factual issue whether the price increases resulted from reduced competition following HBJ's "with-
drawal" or from BRG having to pay additional production costs and salaries. It may be that a large portion of BRG's increased "costs" may simply be HBJ's share of the increased revenues resulting from less price competition. The defendants failed to offer any evidence to rebut the strong inference that the price increases resulted in large part from the defendants' agreements and their adverse effects on competition in the Georgia bar review markets.

2. Bar/Bri Tradename

In addition to price increases, BRG's retention of the exclusive right to

use the Bar/Bri tradename on Georgia materials under the 1982 agreement effectively prevents HBJ from competing with BRG or licensing its multistate materials to any other potential providers of bar review courses in Georgia. In fact, the Bar/Bri tradename has displaced the BRG tradename making BRG and Bar/Bri synonymous as a common business entity in the Georgia marketplace. The defendants' argument that another competing bar review in Georgia could use the Bar/Bri materials under another tradename such as "HBJ Georgia" and compete effectively is highly speculative.

D. Summary

In sum, the plaintiffs have demonstrated that the 1980 agreement and

its modifications impose sufficiently "naked" restraints on price and output making an elaborate inquiry into market analysis unnecessary. Even if the 1980 agreement and its 1982 modifications were legally not sufficiently "naked," the plaintiffs have demonstrated sufficient actual, sustained detrimental effects on competition to survive summary judgment.

V. Sherman Section Two Claims

The plaintiffs allege that the defendants conspired to monopolize,[38]

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[38]. A conspiracy to monopolize requires (1) proof of concerted action deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy. Under a conspiracy theory, the defendants do not have to attain monopoly power nor would they have to obtain monopoly power if their conspiracy had been successful. L. Sullivan, Handbook on the Law of Antitrust 132-34

attempted to monopolize,[39] and monopolized [40] the Georgia market (and relevant submarkets) for bar review courses that prepare law students for the

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(1977).

[39]. Attempted monopolization is an offense distinct from monopolization which requires (1) a specific intent to monopolize and (2) a dangerous probability of success. Lorain Journal Co. v. United States, 342 U.S. 143, 153, 72 S.Ct. 181, 186, 96 L.Ed. 162 (1951). The most important evidence of defendants' specific intent to monopolize is anticompetitive conduct. A dangerous probability of success is measured by a defendant's possession of substantial market power.

[40]. The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market and (2), the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966).

Georgia bar. The district court granted summary judgment in defendants' favor on these counts because it held that the plaintiffs failed to properly identify the relevant product and geographic markets. The court refused to consider additional economic evidence on these claims despite considering such evidence under the plaintiffs' rule of reason claim.

A. Monopoly Power

Under Sherman section 2, a plaintiff must demonstrate that the defendant(s) have either monopoly power or substantial market power in a relevant product and geographic market.[41] In its attempt to

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[41]. Monopoly power is defined as the power to control price or exclude competition and is measured by reference to the relevant market. United States v. E.l. du Pont de Nemours & Co., 351 U.S.

evaluate what degree of economic power the defendants exercised in the relevant market, the district court discounted most of the plaintiffs' totally uncontested evidence.[42] The district court held that "the entirety of Plaintiffs' effort to identify the proper product and geographic markets is contained in the affidavit of Dr. William

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377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264. Market share is the traditional measure of market and monopoly power. United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966) (90% share of relevant market constitutes monopoly power, over 80% share a "substantial monopoly"). The determination of the relevant product and geographic markets (and a defendant's market share), however. is not an exact science and mathematical precision may, at times, yield to administrative convenience.

42. The defendants submitted no evidence to rebut the plaintiffs' market structure analysis.

Henry.... Doctor Henry's affidavit is insufficient to identify or justify a proper product or geographic market." Order, January 9, 1987 at 12. The court held that Dr. Henry's conclusions were "valueless" because he defined the product market in a "narrow and seemingly artificial manner without economic justifications." Id. The court also rejected Dr. Henry's conclusion that Athens, Georgia was a relevant submarket. The court stated that Dr. Henry's analysis did not address "that area in which the product is offered, but rather limits its consideration to the place where the course is administered during the school year." Id.

The district court did not include in its market analysis the deposition of expert witness Prof. David Kamerschen

(including exhibits),[43] the depositions and affidavits of members of the law student class, and the survey data and affidavit provided by Prof. Ponsoldt. The court also neglected Dr. Henry's second affidavit and the defendants' own marketing literature and deposition testimony. These additional materials provide a vivid description of the product and geographic market structure issues relevant to the resolution of the claims in this case.

1. Geographic Submarkets

The court erred in failing to recognize Athens, Georgia as a relevant submarket for Sherman section 2 analysis.

43. Kamerschen's deposition was the principal economic evidence upon which the first class action was based.

The district court correctly notes that BRG offers its review course on a statewide basis.[44] The district court, however, rejected the plantiff's contention that Athens, Georgia was a relevant submarket[45] despite uncontested expert testimony and survey data which indicates that law student preferences and high transportation costs separate Athens from the Atlanta and Macon markets. In addition, 1986-87 survey data

44. "[T]he record discloses that BRG's course is marketed statewide, and is offered at various statewide locations both during the school year and following the close of the school year." Order, January 1, 1987 at 12. The court however failed to consider whether Georgia is a relevant geographic market despite evidence suggesting such a conclusion.

45. The Supreme Court in United States v. Grineoll Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), stated that under Sherman section 2 "there may be submarkets that are separate economic entities."

show that approximately 90% of University of Georgia third year law students take the BRG course during the winter term when they are still enrolled in school.[46] Yet, the district court discounted all this evidence.

Further, the record indicates that BRG and HBJ combined for at least 80% of the Athens market prior to their agreement. Pelletier Deposition at 130. The district court confirms this fact stating that the "vast majority" of University of Georgia law students who took a bar review course conducted in Athens, took either the "Harcourt or the

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[46]. Prof. Ponsoldt conducted the survey of all third year students at the University of Georgia. The survey indicated it was being conducted in "context of a pending federal antitrust case against certain bar review course companies." Record, Vol. 2, Tab 31 at 8. 63 of the 170 third year students responded. Id. at 3.

BRG course" in 1979. Subsequent survey data of University of Georgia law students, who basically constitute the entire Athens market, indicates that BRG has over 95% of the Athens market. Ponsoldt Affidavit, Record Vol. 3, Tab 31, at 3.

2. Relevant Product Market

The plaintiffs presented evidence that the relevant product market is comprehensive bar review courses including lectures and written materials that prepare students to take the Georgia bar exam.[47] The district court, however, held that the plaintiffs failed to establish a relevant product market

In Brown Shoe Co. v. United States,

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[47]. See, e.g., Henry Affidavit, Record, Vol. 2, Tab 17.

370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Court stated:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product market for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the products's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. at 325, 82 S.Ct. at 1523-24. The district court's analysis is contrary to Brown because the plaintiff presented evidence indicating that (1) University of Georgia law students perceived no reasonable alternatives to the comprehensive BRG review course; (2) third year law students (in particular winter semester third year students) are

distinct consumers, and (3) law student consumers were insensitive to price increases because they continued to purchase the BRG course even after large price increases. The defendants own advertising literature and deposition statements also reflect their perception that comprehensive bar review courses that prepare students for the Georgia bar constitute a relevant product market.

This uncontroverted evidence provides substantial support for the plaintiffs' Sherman section 2 claims. Thus, the district court erred in granting summary judgment for the defendants because the plaintiffs' evidence raises a genuine issue of fact regarding whether the defendants violated Sherman section 2.

VI. Conclusion

In conclusion, the district court failed to adequately analyze the plaintiffs, per se price-fixing and market allocation claims. The plaintiffs have demonstrated that BRG and HBJ conspired to restrain trade and entered an explicit written agreement in 1980 which was per se illegal. It remains a factual issue whether the defendants have withdrawn from this conspiratorial agreement. The trial court also erred in failing to properly analyze the plaintiffs, rule of reason claim. The plaintiffs have presented sufficient evidence that the defendants entered an agreement that directly restrained competition in the Georgia bar review market. The plaintiffs have also demonstrated actual anticompetitive

effects arising from the agreement. This same economic evidence supports the plaintiffs' Sherman section 2 claims. I would reverse the district court's summary judgment and all of the foregoing issues.

[APPENDIX B]

Jay PALMER, et al.,
Plaintiffs-Appellants,

v.

BRG OF GEORGIA, INC., a Georgia Corporation, d/b/a Bar/Bri, et al.,
Defendants-Appellees.

No. 87-8804.

United States Court of Appeals,
Eleventh Circuit.

Jan. 29, 1990

John C. Butters, Atlanta, Ga., James

Ponsoldt, Athens, Ga., for plaintiffs-appellants.

Trammell Newton, Jones, Day, Reavis & Pogue, Kevin E. Grady, Alston & Bird, Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion June 7, 1989, 11th Cir. 874 F.2d 1417).

Before HATCHETT and CLARK, Circuit

Judges, and FITZPATRICK[48], District Judge.

BY THE COURT.

Our opinion reported at 874 F.2d 1417 (11th Cir. 1989) is amended by adding the following language on page 1424, right column, following the citation to Citizens Publishing Co. v. United States, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969).

> We agree with the district court that the modified agreement (1982) is not a market allocation agreement to which per se liability applies. First, the agreement is not a "naked agreement" between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors.

48 Honorable Duross Fitzpatrick, U.S. District Judge for the Middle District of Georgia, sitting by designation.

> HBJ's affidavit states that it is no longer a competitor in the Georgia market. The appellants have failed to produce evidence to the contrary. In the absence of evidence other than the affidavit on this issue, we cannot conclude that HBJ is doing business in Georgia.

In all other aspects, the opinion is reissued. Judge Clark adheres to his dissent.

The petitions for rehearing are denied and no member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing in banc (Rule 35, Fed.R.App.P.; 11th Cir.R. 35-5) the suggestions of the rehearing in banc are denied.

[APPENDIX C]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAY PALMER; MICHAEL CHIDISTER;
TREI L. POWERS; DAVID DUNBAR
WILLIAM FURGUSON; BENJAMIN FIRST

vs. CIVIL NO.
C85-4377

BRG OF GEORGIA, INC., a Georgia Corporation (d/b/a "BAR/BRI" in Georgia); BAR REVIEW, INC., a Georgia corporation; BRG PUBLICATIONS, INC., a Georgia Corporation; HARCOURT BRACE

JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., a Delaware Corporation (d/b/a "BAR/BRI" nationally); RONALD O. PELLETIER

ORDER

This antitrust action is before the court on Defendants' motion for summary judgment on all counts and Plaintiffs' cross motion for summary judgment on the issue of liability on one count.

The present action was brought by six 1985 graduates of the University of Georgia Law School in Athens, Georgia. Each of the Plaintiffs took a bar review course offered by BRG of Georgia, Inc. (BRG) in January/February of 1985 in

preparation for the Georgia bar exam.[49] Defendant Ronald O. Pelletier owns BRG, which was formed in 1979 for the sole purpose of offering bar review courses to Georgia bar applicants.

In 1979, BRG began offering a bar review course.[50] The course covered both the multi-state and the Georgia law components of the Georgia bar exam. It included written materials, plus live and videotaped lectures by lawyers/law professors. At this time, BRG was able to use standardized materials provided

[49] Defendants BRG Publications, Inc. and Bar Review Group, Inc. are related corporations which have been defunct at relevant times and had no involvement in any allegedly anti-competitive activities. These defendants are GRANTED summary judgment on all counts.

[50] Prior to that, Defendant Bar Review Group, Inc. offered Georgia courses. BRG was its successor.

free by West Publishing Company, which was test marketing them. The availability of the free multi-state materials enabled BRG to offer the bar review course at a lower price than it would have charged otherwise.

For many years, Defendant Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("Harcourt") has offered bar review courses virtually nationwide under the trade name "Bar/Bri." It began offering a review course for the Georgia exam in 1973. The record does not contain a precise description of Harcourt's Georgia course, but the parties state that it was similar to the format of the BRG course. Harcourt developed its own standardized multi-state materials and sold these as part of its Georgia course.

In 1979, BRG and Harcourt competed in Georgia. BRG conducted and intense advertising campaign which Harcourt contended included false representations. In response to the low price of BRG's course, Harcourt reduced the price of its Georgia course. Harcourt lost money on its Georgia course in 1979.[51]

At some time in 1979, West Publishing Company informed BRG that it planned to sell its multi-state materials through book stores. Therefore, the would no longer be furnished. At about the same time, the lawyer who had been in charge of conducting Harcourt's Georgia course had a heart attack. Richard Conviser, chairman of Harcourt's board of

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[51] Mr. Conviser's affidavit states that Harcourt lost $45,000.00 on revenues of $120,000 without accounting for headquarters overhead.

directors, states in his affidavit that Harcourt decided it would withdraw from the Georgia market, but no documentation of this decision has been offered. Plaintiff's question this testimony of Conviser's.

In any event, in early 1980, Messrs. Conviser and Pelletier got together. At this time Harcourt was still selling its course in Georgia. BRG and Harcourt entered into a written agreement on April 22, 1980. This agreement gave BRG and exclusive license to market Harcourt's multi-state materials as part of BRG's course. BRG was granted and exclusive license to use Harcourt's trade name "Bar/Bri" in Georgia. Harcourt agreed that it would no longer offer a bar review course in Georgia and that it would not compete with BRG in Georgia.

BRG agreed not to compete with Harcourt outside Georgia.

Immediately after the 1980 agreement was executed, the price of BRG's course skyrocketed for $150 to over $400.[52] In February, 1982, a class action lawsuit was brought by a group of Georgia law students against the same defendants named in the instant suit, alleging precisely the same antitrust violations alleged herein.[53] This action was concluded by a settlement offering partial refunds to class members. The class included those taking BRG's course between April 22, 1980 up to June 15,

[52] The record does not disclose what prices Harcourt or other companies were charging for similar bar review courses.

[53] This action was Edwards, et al. v. BRG of Georgia, Inc., et al., Middle District of Georgia, Circuit A, No. 82-13-Ath).

1984.

During the pendency of the first class action, BRG and Harcourt executed a modified agreement. This was in 1982. First, the original agreement was changed so that BRG no longer had the stated exclusive right to market Harcourt's multi-state materials in Georgia. However, BRG retained the exclusive right to use the name "Bar/Bri" in connection with its course. Second, the modified agreement dropped the express covenants not to compete which had been contained in the initial agreement. Since the 1982 agreement was executed Harcourt has not competed with BRG in Georgia, and has not licensed its multi-state materials for use by any other Georgia bar review course.

In 1979, the vast majority of

University of Georgia law students who took a bar review course conducted in Athens, Georgia, took either the Harcourt or the BRG course. The record contains no similar data for subsequent years. The BRG course is marketed statewide, and is conducted at various locations in Georgia including Athens and Atlanta. Other bar review courses are offered to Georgia bar applicants, namely, the "NORD" and "PMBR" courses, but the record does not describe those courses.

In the instant action, Plaintiffs seek to represent a class consisting of those who attended a BRG course in Athens, Georgia, between June 15, 1984 and the present. Counts one through four each allege violations of §1 of the

Sherman Act, 15 U.S.C. §1.[54] A different theory of per se liability is advanced under each of these counts, namely, "price-fixing cartel" (count one); market/customer allocation (count two); boycott/concerted refusal to deal (count three); and "unreasonable joint venture" (count four).[55]

Counts five through nine of the complaint each allege violations of §2 of

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[54] §1 of the Sherman Act provides: "Every contract , combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...."

[55] The court notes that these theories are improperly pled as separate counts. Plaintiffs have one cause of action for alleged violation of §1 of the Sherman Act. However, for the ease of reference, the court will refer to the designations chosen by Plaintiffs.

the Sherman Act, 15 U.S.C. §2.[56] The allegations are: conspiracy to monopolize in Georgia (count five); attempt to monopolize in Georgia (count six); monopoly in Georgia (count seven); conspiracy to monopolize nationwide (count eight); and attempt to monopolize nationwide (count nine).

In an antitrust case, a party opposing summary judgment must come forward with "specific facts showing that there is a genuine issue for trial." Matsushita Electric Industrial Co. v. Zenith Radio Corp., __U.S.__, 106 S.Ct. 1348, 89 L.Ed. 538 (1986) (emphasis by

[56] §2 of the Sherman act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed [to have violated this Act]...."

court). This requires a showing of "significant, probative evidence of the existence of genuine issues of fact." Amey, Inc. v. Gulf Abstract and Title, Inc., 758 F.2d 1486, 1488 (11th Cir. 1985), cert. denied, __U.S.__, 106 S.Ct. 1513 (1986).

Plaintiffs have addressed counts eight and nine in their briefs in opposition to Defendants' motion, and have not filed any evidentiary materials pertinent to those counts in opposition to the motion. Accordingly, Defendants' motion for summary judgment is GRANTED on counts eight and nine.

The court now turns to counts one through four. Generally, a plaintiff asserting a claim under §1 of the Sherman Act must prove that the defendants' acts or conduct had an anticompetitive effect

in relevant geographic and product markets. See, Standard Oil Co. v. United States, 337 U.S. 293 (1949). Because plaintiff bears the burden of proof, it must make a factual showing in support of these elements where the defendant moves for summary judgment. Celotex Corp. v. Catrett, __U.S.___, 106 S.Ct. 2548, 91 L.Ed. 265 (1986).

However, where the defendant's complained of acts and conduct fit certain judicially recognized categories, plaintiff need not establish that the defendant's conduct actually had an anticompetitive effect, and neither need the plaintiff establish the relevant geographic and product markets. Anticompetitive effect in the marketplace is presumed, and the defendant is automatically liable for any damages

suffered by plaintiff, hence, the term "per se liability." The rationale is that the designated conduct is so inherently and reliably anticompetitive that its anticompetitive effects may be presumed, rather than proven. Thus, the plaintiffs in the instant case seek to denominate the agreements and dealings between BRG and Harcourt as arrangements of the type as to which per se liability has been recognized, namely, price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); market and customer allocation, United States v. Topco-Associates, Inc., 405 U.S. 596 (1972); boycott/concerted refusal to deal, Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941); and unreasonable joint venture, Citizen Publishing Co. v. United

States, 394 U.S. 131 (1969).

The court finds that the arrangement between BRG and Harcourt does not fit within any recognized category of per se liability. First, the agreement is not a classic form of price fixing where two competitors agree what price they will charge for their products. On the contrary, neither agreement explicitly addresses the factor of price, and Harcourt has never had any right under either the 1980 or 1982 agreement to be consulted about the price of the BRG course. While it is true that the agreement of two competitors to "pool" their price may exert an upward influence on price, such an agreement is not inherently anticompetitive, and in a given setting could actually be procompetitive.

Neither agreement between BRG and Harcourt constitutes the sort of market or customer allocation agreement which has been recognized as a basis for per se liability. Cf. Topco, 405 U.S. 596. This is not a situation where competitors divided up a market in which both have previously done business, each taking a portion of the market. BRG has never done business outside the state of Georgia, and nothing in the record suggests it ever intended to do so. Harcourt as noted has done business virtually nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and Harcourt. Thus, the only market ever claimed by both Defendants is the state of Georgia, and clearly the state of Georgia was not divided up under either the 1980 or 1982

agreements.

The Defendants' asserted conduct plainly does not constitute a boycott or concerted refusal to deal. Cf. Zenith Radio Corp. v. Hazeltine Research, Inc., 39 U.S. 100 (1969); Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941). Plaintiffs' attempt to invoke this theory by arguing that the agreement prohibits BRG from hiring certain law lecturers is unavailing, because Plaintiffs have no standing to raise this argument.

Finally, the conduct described in the record differs from that recognized in Citizen Publishing Co. v. United States, 394 U.S. 131 (1969), as an unreasonable joint venture which was per se illegal. In the instant case, BRG and Harcourt did not pool capital and

Harcourt has no risk of loss on the Georgia bar review course. Thus, the arrangement created was not a joint venture and the Citizens Publishing theory is inapplicable here.

Because no theory of per se liability applies to the claims under §1 of the Sherman Act, Plaintiffs may only prevail by showing evidence that Defendants' arrangements had an anticompetitive effect in relevant geographic and product markets. Although the manner in which the Plaintiffs pled their complaint implies they have elected to forego this option, the court will nonetheless allow them thirty (30) days within which to file such evidence and briefs as they may wish to file addressing these elements. In the meantime, Plaintiffs' motion for partial

summary judgment is DENIED; Defendants' motion for summary judgment on counts two through four is GRANTED; and the court DEFERS ruling on Defendants' motion for summary judgment as to count one.

The court now turns to counts five through seven which are brought under §2 of the Sherman Act. Count five alleges a conspiracy to monopolize in Georgia; count six alleges an attempt to monopolize in Georgia; and count seven alleges monopoly in Georgia. While Defendants have made various arguments with respect to these counts, the Court will only address Defendants' arguments of insufficient evidence of (1) relevant product and geographic markets, and (2) monopoly power or dangerous probability of monopoly. Proof of the relevant geographic and product market is

essential to all §2 claims. See American Key Corp. v. Cole Nat. Corp., 762 F.2d 1569, 1579 (11th Cir. 1985) (conspiracy to monopolize); United States v. Grinnell Corp., 384 U.S. 563 (1966) (monopolization and attempted monopolization).

The entirety of Plaintiffs' effort to identify proper product and geographic markets is contained in the affidavit of Dr. William Henry, filed in opposition to Defendants' motion for summary judgment. The affidavit states:

> Dr. William Henry, being duly sworn, deposes and says:
>
> 1.
>
> I am Professor of Finance in the College of Business Administration at Georgia State University with a Ph.D. degree in economics from North Carolina State University, and give this affidavit in the above-captioned matter.

2.

I have reviewed the depositions of the plaintiffs in this action, the deposition of Ronald Pelletier, the enrollment contracts produced by the defendants, and the deposition of Professor David Kamerschen, taken in the case of Edwards et al. v. BRG of Georgia, Inc., C.A. No. 82-13-Ath together with the exhibits thereto.

3.

Upon review of the depositions of the named plaintiffs and the deposition of Ronald Pelletier it is apparent that nearly all students at the University of Georgia School of Law take the defendants' bar review course. Because the students taking the course are also enrolled as full-time students at the law school in Athens, it is not realistic to expect that they could reasonable [SIC] take a course offered outside the Athens area. Further, Ronald Pelletier testified that defendants accounted for at least eighty percent of the sales of bar review courses in the Athens area.

4.

I conclude that a comprehensive bar review course which includes lectures and written material offered in Athens, Georgia to prepare students to take the Georgia bar examination is the relevant product market and that Athens is a relevant geographic market for purposes of economic analysis. I further conclude that defendants and have had the power to control prices in the market, and that defendants therefore have monopoly power in the relevant geographic and product markets.

This 12th day of May, 1986.

<u>/s/ William R. Henry</u>
Dr. William Henry

Dr. Henry's affidavit is insufficient to identify or justify a proper product of geographic market. A relevant product market includes those goods or services with which defendant's product effectively competes. <u>In Re: Municipal Bond Reporting Antitrust Litigation</u>, 672 F.2d 436, 442-43 (5th

Cir. 1982). Dr. Henry's affidavit asserts only that "a comprehensive bar review course which includes lectures and written material offered in Athens, Georgia to prepare students to take the Georgia bar examination is the relevant product market." Assuming that this seeks to identify a "market" rather than a "product," Dr. Henry fails to state how he arrived at this conclusion. Apparently, Dr. Henry considers that bar review courses which include only written materials are not within the relevant product market, and that comprehensive courses offered, for example, in Atlanta outside the normal school year are not included within the relevant product market. Particularly because Dr. Henry has chosen to define the product market in such a narrow and seemingly artificial

manner, the lack of justification for his conclusion renders it valueless.

The relevant geographic market is the geographic area of "effective competition" for the product in question. American Key Corp., 762 F.2d at 1581. Dr. Henry's affidavit is similarly deficient to identify the relevant geographic market. The affidavit does not address at all the area in which the product is offered, but rather limits its consideration to the place where the course is administered during the school year. Since the record discloses that BRG's course is marketed statewide, and is offered at various statewide locations both during the school year and following the close of the school year, Dr. Henry's conclusion that Athens, Georgia is a relevant submarket is without evidentiary

value.

Although Plaintiffs' failure to properly identify relevant product and geographic markets requires the grant of summary judgment as to counts five through seven, counts six (attempt to monopolize in Georgia) and seven (monopoly in Georgia) fail for additional reasons. To prove a claim of monopoly (count seven), an antitrust plaintiff must prove monopoly power, i.e., the power or ability to fix or control prices in the relevant market or to exclude competition form the market. United States v. Grinnell Corp., 384 U.S. 563 (1966). To prove an attempt to monopolize (count six), an antitrust plaintiff must prove the existence of a "dangerous probability" of establishment of monopoly. American Tobacco Co. v.

United States, 328 U.S. 781 (1946). Plaintiffs' only effort to show evidence of theses elements is the conclusory statements of the named Plaintiffs that they had "no other choice" that the BRG course when they took it in February 1984 in Athens, and the statement in Dr. Henry's affidavit "Further, Ronald Pelletier testified that Defendants accounted for at least 80% of the sales of bar review courses in the Athens area." Plaintiffs' assertions are clearly insufficient. In addition, the relevant portion of Mr. Pelletier's deposition reflects that he was referring to the year 1979, and that his reference was to courses administered, not offered or sold, in Athens. Pelletier Deposition, p. 51.

The admittedly large increase in the

price of BRG's course after the 1980 agreement was executed is not evidence of market power, particularly where the record fails to reflect what prices were being charged at that time for other bar review courses.

Accordingly, Defendants' motion for summary judgment is hereby GRANTED as to counts two through nine. Plaintiff's motion for partial summary judgment is DENIED. The court DEFERS ruling on Defendants' motion for summary judgment insofar as it pertains to count one. The clerk is hereby DIRECTED to resubmit the motion within thirty (30) days from the date of entry of this order. Should Plaintiffs elect to file further evidentiary materials within that time, the court will then set a time within which Defendants may respond.

SO ORDERED, this 9 day of January, 1987.

/s/Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[APPENDIX D]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAY PALMER; MICHAEL CHIDISTER;
TREI L. POWERS; DAVID DUNBAR
WILLIAM FURGUSON; BENJAMIN FIRST

vs. CIVIL NO. C85-4377

BRG OF GEORGIA, INC., a Georgia Corporation (d/b/a "BAR/BRI" in Georgia); BAR REVIEW, INC., a Georgia corporation; BRG PUBLICATIONS, INC., a Georgia Corporation; HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., a Delaware Corporation (d/b/a "BAR/BRI" nationally); RONALD O. PELLETIER

ORDER

This antitrust suit is before the court on Plaintiffs' motion for class certification. Plaintiffs are six graduates of the University of Georgia Law School who took Defendant BRG's bar review course in Athens, Georgia, in January/February, 1985. They contend the

price of the course was artifically inflated due to Defendants' alleged antitrust violations. They seek to represent a class consisting of all persons who took the BRG course in Athens, Georgia, on or after June 15, 1984. By previous order filed June 3, 1986, the court deferred consideration of the instant motion.

By order of even date herewith, Defendants' motion for summary judgment has been granted on all counts except one. As to the remaining count, the court has held that the only theory clearly pled in Plaintiffs' complaint--that of *per se* liability--is unavailing. However, Plaintiffs have been allowed an additional thirty days within which to proceed on an alternative theory. The court expects that a decision to proceed

on the alternative theory would require a much greater degree of financial commitment to this case than Plantiffs' depositions reflect that they have. At this juncture, Plaintiffs only state that they are only capable of assuming the cost of mailing notice to approximately 280 absent class members.

Rule 23(a), Fed.R.Civ.P., requires that parties seeking to represent a class demonstrate that they will adequately protect the interests of the class. Because Plaintiffs may lack financial committment sufficient for adequate investigation and trial preparation in light of the court's ruling, the court finds that certification of the class would be improper at this juncture. Accordingly, the motion for class certification is hereby DENIED.

SO ORDERED, this 9 day of January, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[APPENDIX E]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAY PALMER; MICHAEL CHIDISTER; TREI L. POWERS; DAVID DUNBAR WILLIAM FURGUSON; BENJAMIN FIRST

vs. CIVIL NO. C85-4377

BRG OF GEORGIA, INC., a Georgia Corporation (d/b/a "BAR/BRI" in Georgia); BAR REVIEW, INC., a Georgia corporation; BRG PUBLICATIONS, INC., a Georgia Corporation; HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., a Delaware Corporation (d/b/a "BAR/BRI" nationally); RONALD O. PELLETIER

ORDER

This antitrust suit is now before the court pursuant to this court's order of January 9, 1987, as well as Plaintiffs' motion for reconsideration and Plaintiffs' motion to strike and for additional discovery.

Plaintiffs filed the present action

on November 4, 1985, alleging violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and sought certification as a class action.

The parties filed cross motions for summary judgment. On January 9, 1987, the court denied Plaintiffs' motion for summary judgment, granted Defendants' motion for summary judgment on counts two through nine, and deferred summary judgment on count one to permit filing of additional materials.[57]

The court first notes that Plaintiffs' motion is much broader in scope than the parameters set by the court's order of January 9. Plaintiffs were given leave to supplement the record

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[57] The order of January 9, 1987 set out fully the pertinent facts and the court's reasoning, which will not be repeated herein.

as to count one with evidence and argument that Defendants' contract has an anticompetitive effect in relevant geographic and product markets. Plaintiffs have done this; the new evidence and arguments as to count one will be considered below. However, the parties' cross motions for summary judgment as to counts two through nine will not be reconsidered. Neither will the court reconsider Plaintiffs' motion for class certification.

Turning to the new evidence offered in connection with a rule of reason theory in count one, it is first necessary to rule on motions to strike certain of the evidence. Plaintiffs move to strike the affidavit of Richard F. Duffy, Vice-President and Treasurer of Defendant Harcourt, which Defendants

filed on March 12, 1987. The gist of the affidavit is that the price paid by the named Plaintiffs to Defendant BRG for their 1985 course was not that high in comparison with prices paid for bar review courses in 39 other states where Harcourt markets or licenses a course. Rather, it was an intermediate price. Additionally, the affidavit states that Noi is advertising a review course for the 1987 Georgia bar exam at a cost of $636, and that it consists of 200 hours of audio cassette instruction, of which 40 hours relate to the Georgia law portion of the exam.

Plaintiffs' arguments that the affidavits should be stricken because it contains hearsay and is speculative is not well taken. Plaintiffs alternative request for additional discovery is

denied because the discovery identified as needed does not relate to matters covered by Mr. Duffy's affidavit. Specifically. Plaintiffs state that they wish further discovery concerning the "pricing practices and market share of HBJ [Harcourt] in other states...." Accordingly, the motion to strike Mr. Duffy's affidavit is denied; the request for additional discovery is denied.

In their brief of law filed May 13, 1987, Defendants have asked the court to disregard an evidentiary submission of Plaintiffs which was filed May 7, 1987. The referenced evidentiary submission is entitled "Plaintiffs' Brief of Newly Discovered Materials Submitted in Response to the Court's Order and in Support of Plaintiffs' Motion for Reconsideration." It consists partly of

the affidavit of David Naylor, a third year law student at Woodrow Wilson School of Law in Atlanta. The gist of the affidavit is that BRG has once again increased the price of its bar review course from $795 to $855 effective May 15. Also, Plaintiffs offer a copy of a jury charge recently given by the undersigned in a criminal bid rigging case under §1 of the Sherman Act, claiming it "conflicts" with the January 9, order herein. The criminal jury charge has no relevance at all to the issues presently before the court; it is hereby stricken. The objection to the Naylor affidavit is overruled.

In support of their claim that relief should be granted under a rule of reason theory, Plaintiffs have filed a number of affidavits and supporting data.

The question before the court is whether Plaintiffs have offered "significant, probative evidence," Amey, Inc. v. Gulf Abstract and Title, Inc., 758 F.2d 1486, 1488 (11th Cir. 1985), cert. denied, __U.S. __, 106 S.Ct. 1513 (1986), that the Defendants' 1980 agreement as modified in 1982 has an anticompetitive effect in relevant geographic and product markets. January 9, 1987 Order, p. 9.

On the issue of anticompetitive effect, the Plaintiffs offered the contract itself, the fact that the price went up after the contract was signed, and the affidavit of Leon Van Gelderen, a Georgia State School of Law graduate.

As stated in the January 9 order, the contract between BRG and Harcourt was amended in 1982 to make BRG's license

nonexclusive and to delete the covenants not to compete. Therefore, since 1982, the contract on its face has not contained anticompetitive provisions. It does not reflect that BRG purchases the multi-state materials from Harcourt, pays harcourt a fee, and uses Harcourt's trade name "BAR/BRI." Under the circumstances, it is fair to conclude that the possibility of anticompetitive effect exists, but that such effect cannot be presumed from the contract itself.

Further, the fact that the price of BRG's course went up significantly after the 1980 contract was signed does not suffice to demonstrate anticompetitive effect, when the price increase came on the heels of West Publishing's withdrawing the free multi-state materials which previously had been

provided free to BRG. It is clear that the multi-state materials constitute a major part of the BRG review course, and it is safe to assume that there are costs associated with developing or acquiring multi-state examination materials. On the instant record, it is as reasonable to assume that the price increase reflected these additional costs as it is to assume that the higher prices were merely to gouge the consumers.

The affidavit of Van Gelderen does not add significant evidence on the issue of anticompetitive effect. It only states that he took a comprehensive bar review course in the state of Washington in 1985 from a competitor of BAR/BRI; the cost was $290. The BAR/BRI course then offered in the state of Washington was $300. The limited import of the

testimony is offset by Mr. Duffy's affidavit in which he states that while the prices stated by Van Gelderen are correct, they were nearly the lowest prices in the 40 states in which Harcourt offers or licenses bar review courses.

The issues of relevant product market and relevant geographic market are addressed in an affidavit of Dr. William Henry filed February 9, 1987. The additional affidavit of Dr. Henry states that the relevant product market is "comprehensive bar review courses that prepare students to take the Georgia bar examination." He states that the relevant geographic market is "Athens, Georgia during the winter academic term of law school." The affidavit does not define the term "comprehensive bar review courses," but rather seems to assume that

these are courses having the attributes of BRG's course. Thus, it is uncertain whether (for example) an audio cassette course or written materials covering both multi-state and Georgia law portions would constitute a "comprehensive bar review course." The court notes various materials submitted by Plaintiffs reflecting the views of Athens law students that the BRG course is the only "all inclusive" course available. While these perceptions are relevant in defining product market, they are not a substitute for expert analysis.

The Court further finds that "Athens, Georgia during the winter academic term of law school" is not a relevant geographic market. The temporal limitation is inappropriate. Further, the geographic area is too small,

particularly given that the number of consumers within the area is quite small. The court reflects that in 1985-1986, 181 graduates of the University of Georgia took the Georgia bar exam. Finally, the Defendants' contract anticipated that the BRG course would be offered statewide, which it is. Thus, the alleged anticompetitive effect of the contract is more appropriately measured statewide.

The court finds that there is not significant, probative evidence before it that the modified contractual arrangement has a present anticompetitive effect in a relevant geographic and product market. Accordingly, Defendants' motion for summary judgment on count one is GRANTED. Plaintiffs, motion for summary judgment on count one is DENIED. All claims having been ruled on, the clerk is hereby

DIRECTED to enter judgment in favor of Defendants.

SO ORDERED, this 8 day of July, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[APPENDIX F]

Jay PALMER, et al.,
Plaintiffs-Appellants,
v.
BRG OF GEORGIA, INC., a Georgia Corporation, d/b/a BAR/BRI, et al.,
Defendant-Appellees.

No. 87-8804.

United States Court of Appeals,
Eleventh Circuit.

O R D E R:

Bryan Downs', President of the Student Bar Association of the University of Georgia School of Law, on behalf of the Student Bar Association, and Margaret Murphy's, Vice President of the Third Year Class of the University of Georgia School of Law, on behalf of the third year class, motion for leave to file brief as amicus curiae in support of appellants' petition for panel rehearing and rehearing in banc is **granted.**

The United States of America's

motion for leave to file amicus curiae in support of suggestion of rehearing in banc is **granted.**

<u>/s/ Joseph W. Hatchett</u>
UNITED STATES CIRCUIT JUDGE

(2)

No. 89-1667

In The

Supreme Court of the United States

October Term, 1989

JAY PALMER, et al.,
Petitioners,

v.

BRG OF GEORGIA, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:
Kevin E. Grady
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

Attorneys for Respondents
BRG of Georgia, Inc.,
Bar Review Group, Inc.,
BRG Publications, Inc.,
and Ronald O. Pelletier

Counsel of Record:
Lee Trammell Newton, Jr.
JONES, DAY, REAVIS & POGUE
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
(404) 521-3939

Of Counsel:
Trammell E. Vickery
TROUTMAN, SANDERS,
LOCKERMAN & ASHMORE
1200 Chandler Building
Atlanta, Georgia 30303

Attorneys for Respondent
Harcourt Brace Jovanovich
Legal and Professional
Publications, Inc.

Lex Publishing Company, 2161 Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

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LIST OF PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings below were the Petitioners Jay L. Palmer, Benjamin M. First, Michael L. Chidester, Teri L. Powers, David Dunbar, and William R. Ferguson, seeking to represent a class of purchasers of respondents' bar review course in northeast Georgia between 1984 and the present, and the Respondents BRG of Georgia, Inc., Bar Review Group, Inc., BRG Publications, Inc., Harcourt Brace Jovanovich Legal and Professional Publications, Inc., and Ronald O. Pelletier. Harcourt Brace Jovanovich Legal and Professional Publications, Inc. is a subsidiary of Harcourt Brace Jovanovich, Inc.* Amicus Curiae briefs were filed in the Court of Appeals by the United States of America, Bryan Downs, and Margaret Murphy.

* In compliance with Rule 29.1, the following are the subsidiaries of Harcourt Brace Jovanovich, Inc. which Harcourt Brace Jovanovich, Inc. does not wholly own: Harcourt Brace Jovanovich, Japan, Inc. and The Harvest Life Insurance Agency, Inc. Through the wholly-owned subsidiary HRW and WBS Canada Corporation, Inc., the corporation also owns interest in Holt, Rinehart and Winston of Canada Limited, Les Editions HRW Ltee., and W.B. Saunders Canada Limited.

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No. 89-1667

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Eleventh Circuit's opinion affirming judgment in favor of the Respondents.

STATEMENT OF THE CASE

This case involves the second proposed antitrust class action against respondents Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJ Legal") and BRG of Georgia, Inc. ("BRG"). The first lawsuit challenged an agreement executed by the respondents in 1980 in which HBJ Legal licensed copyrighted bar review materials to BRG for use in BRG's bar review course in Georgia. That agreement was negotiated only after HBJ Legal had decided, for its own legitimate reasons, to stop offering its own bar review course in Georgia. R2-14, Ex. B, 2; Conviser Dep. at 30-31.

The litigation which the petitioners now seek to have reviewed involves a challenge to respondents' alleged conduct after execution of a new license agreement in 1982. The uncontradicted purpose of the 1982 agreement was to facilitate a compromise of the first lawsuit, and to make clear, by affirmatively removing BRG's exclusive right to license and use HBJ Legal's materials in Georgia, that HBJ Legal and BRG were free to compete with each other in offering courses in Georgia. R2-14, Ex. B, ¶ 6 and Ex. C, ¶¶ 8-9 and Ex. D.[1] After entering the 1982

[1] The respondents and plaintiffs' counsel advised the district court considering approval of the class settlement in the first lawsuit of the elimination of the exclusive right, a fact which that court noted in its approval of the settlement. R2-14, Ex. A, ¶ VI. The attorney who appeared as counsel for the named plaintiffs in both lawsuits submitted an affidavit in the first case in support of settlement approval and his own application for attorney's fees in which he declared that "defendants have ended their exclusive licensing arrangement, thus opening the way for increased competition in the bar review market." R1-9A, Ex. B.

agreement, HBJ Legal in fact sought other licensees (although without success) to use its materials in Georgia in competition with BRG. R2-14, Ex. B, ¶ 9. After entering the 1982 agreement, there was no communication at all between the principals of HBJ Legal and BRG. *Id.*, ¶ 8. The only evidence in the record on the post-1982 relationship of HBJ Legal and BRG consisted of the sworn testimony of the principals of the two companies that the 1982 agreement accurately, completely and entirely expressed a relationship in which each company was free to compete with the other wherever and however it chose. R2-14, Ex. B, ¶ 6 and Ex. C, ¶ 9.

The complaint in this, the second lawsuit, made no reference at all to the 1982 agreement.[2] The petition for certiorari recites the execution of the new agreement (at 10), but thereafter all but ignores the 1982 agreement.

[2] None of the named plaintiffs were told by their counsel that a new agreement had been executed. Dunbar Dep. at 61; Fist Dep. at 31-32; Palmer Dep. at 28-29; Chidester Dep. at 24; Powers Dep. at 21-22; Ferguson Dep. at 44.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's opinion states no new legal standard on horizontal market allocation because the Eleventh Circuit made clear in the modification of its original opinion that there was no evidence that the respondents competed with each other. The Eleventh Circuit properly refused to apply a *per se* rule of antitrust liability to a vertical relationship. The decision does not raise the issue which petitioners claim is presented.

Petitioners were properly required to offer competent market structure evidence in support of their rule of reason theory. Petitioners failed to offer evidence of a "naked" restraint which would have authorized a "quick look" rule of reason analysis, and failed to make any threshhold showing that the commonly utilized royalty and exclusive trade name provisions of the agreement between respondents were in any way unreasonable. The Eleventh Circuit's rejection of such conclusory and inadmissible market structure evidence as the petitioners did offer was proper, and does not merit this Court's consideration.

This case presents no occasion for exercise of this Court's supervisory power over the Eleventh Circuit. The decision below followed this Court's authority on the controlling issues. Petitioners' speculation about the panel's asserted failure to review the record is wholly unwarranted.

ARGUMENT: REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION DOES NOT STATE ANY NEW OR DIFFERENT STANDARD ON HORIZONTAL "PRICE-FIXING" AND "MARKET ALLOCATION."

The petitioners' argument that the Eleventh Circuit has deliberately and improperly departed from well-established precedent on *horizontal* "price-fixing" and "market allocation" is based on a false premise. The petitioners wrongly assume, or simply assert, that the Eleventh Circuit's opinion addresses relationships between *horizontal* competitors.

The Eleventh Circuit initially held that the relationship between HBJ Legal and BRG was not "a classic form of price-fixing where *two competitors* agreed what price they would charge for their products," *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1424 (11th Cir. 1989), *modified*, 893 F.2d 293 (11th Cir. 1990) (emphasis added), and that the record did not show a situation "where *competitors* divided up a market *in which both were doing business*, each taking a portion of the market," *id.* (emphasis added). It is the use of these words that petitioners challenge. Petition at 16. The language was intended to convey only the conclusion that because HBJ Legal and BRG were not in fact competitors in 1985, they could not be found to have entered any horizontal conspiracy. The Justice Department filed an amicus brief at the rehearing stage because the Eleventh Circuit had not clearly indicated that its opinion addressed a vertical, not a horizon-

tal, relationship.[3] The Eleventh Circuit removed the ambiguity on this point in its subsequent modification of its opinion:

> We agree with the district court that the modified agreement (1982) is not a market allocation agreement to which per se liability applies. First, the agreement is not a "naked" agreement between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors. HBJ's affidavit states that it is no longer a competitor in the Georgia market. The appellants have failed to produce evidence to the contrary. In the absence of evidence other than the affidavit on this issue, we cannot conclude that HBJ is doing business in Georgia.

Palmer (as modified), 893 F.2d 293.

The Eleventh Circuit's opinion does nothing more than reaffirm well-established law that *vertical* arrangements are to be tested under the rule of reason.

Petitioners' real disagreement with the Eleventh Circuit is on the sufficiency of their evidence to establish a horizontal relationship, not on whether some putative horizontal relationship was or was not *per se* illegal. While this case thus involves the applicability of Fed. R.

[3] The Justice Department indicated that its concern was with a holding that could be read as a "limitation of the per se prohibition on market allocation by *horizontal* competitors to circumstances in which parties to the agreement divide between themselves a market *in which both were doing and continue to do business.*" Memorandum Of The United States of America As Amicus Curiae In Support Of Suggestion Of Rehearing En Banc at 2-3. The Justice Department otherwise expressly took "no position" concerning the merits of the case. *Id.* at 2.

Civ. P. 56 to Sherman Act Section One conspiracy cases, it does not raise the substantive antitrust question that petitioners attempt to have this Court address. *See* Petition at i, "Question Presented [No.] 1."

II. PETITIONERS WERE PROPERLY REQUIRED TO OFFER COMPETENT MARKET STRUCTURE EVIDENCE TO SUPPORT THEIR "RULE OF REASON" THEORY.

This case does not raise the Sherman Act Section One "rule of reason" issues that petitioners would have this Court address because the petitioners failed to produce evidence of an *unreasonable agreement* that needed to be evaluated, either with or without consideration of market structure evidence.

The petitioners persistently sidestep the undisputed fact that there was no evidence in the record that, after the 1982 agreement dispensed with BRG's exclusive right to license and use HBJ Legal's materials in Georgia, HBJ Legal and BRG had any understanding on the prices either of them would charge purchasers, or where or how either of them would compete in Georgia or elsewhere. The record showed only that there was no post-1982 communication between the principals of HBJ Legal and BRG on any subject (R2-14, Ex. B, ¶ 8); that HBJ Legal in fact sought additional licensees to compete with BRG in Georgia (R2-14, Ex. B, ¶ 9); and that HBJ Legal and BRG affirmatively denied the existence of any understanding other than as set forth in the 1982 agreement (R2-14, Ex. B ¶ 6 and Ex. C, ¶ 9). The Eleventh Circuit correctly concluded, in language that petitioners consistently omit from their quotation of the Eleventh Circuit's opinion as modified, that

petitioners simply "failed to produce evidence to the contrary." *Palmer* (as modified), 893 F.2d 293.

The Eleventh Circuit's determination that petitioners had failed to produce evidence from which a horizontal conspiracy to fix prices or allocate customers could be inferred takes away the predicate for both branches of petitioners' "rule of reason" argument.

In a transparent effort to excuse their failure to submit admissible evidence on the alleged markets in question, petitioners first argue that *NCAA v. Board of Regents*, 468 U.S. 85 (1984), *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1987), and *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), did not require market structure proof. Contrary to the uncontradicted facts in this case, however, all of those cases in fact involved a "naked" restraint of trade, *i.e.*, a restraint which would in all likelihood be classified as *per se* illegal but for some potential policy or other justification. Thus, in *NCAA*, this Court agreed with the trial court's finding that the challenged conduct constituted "horizontal price-fixing," but decided that applying the *per se* rule to "an industry in which horizontal restraints on competition are essential if the product is to be available at all" could not be justified. 468 U.S. at 100-01. Similarly, in *Indiana Federation*, the challenged agreement to withhold services from customers was found to be the equivalent of a "joint refusal to compete with respect to the price term of an agreement," 476 U.S. at 459, but subject, potentially at least, to possible justification.[4] As the Eleventh Circuit

[4] The Seventh Circuit's holding in *Wilk v. American Medical Association*, 895 F.2d 352 (7th Cir. 1990), on which petitioners also rely,

correctly held, however, no such "naked" restraint is involved here.

Having failed to produce proof of a "naked" restraint that would have authorized the kind of "quick look" analysis actually utilized in *NCAA, Indiana Federation* and *Wilk*, petitioners next argue that mere "detrimental effects" alone establish a "rule of reason" violation. Under their theory, market structure proof would apparently never have to be offered in a "rule of reason" case.

NCAA, Indiana Federation and *Wilk* did not reverse a century of antitrust jurisprudence. Petitioners were still required to make some threshhold showing that the restraints challenged were in fact unreasonable. Petitioners can now point, however, only to normal and common provisions in the 1982 agreement involving the royalty fees to be paid by BRG to HBJ Legal (*not* what BRG was to charge its customers) and the exclusive license (in Georgia) of one of HBJ Legal's trade names. *See* Petition at 10. The royalty clause had no different effect than any other wholesaler's price to a retailer. Such arrangements have been consistently upheld by the courts. *See, e.g., General Cinema Corp. v. Buena Vista Distribution Co.*, 681 F.2d 594, 597-98 (9th Cir. 1982) (approving similar royalty formula). The trade name restriction similarly could not

involved what the Seventh Circuit described as a "group boycott[], typically . . . held unlawful *per se*," saved from automatic condemnation only by the Seventh Circuit's perception that this Court has been reluctant to treat rules adopted by professional associations as unreasonable *per se*. *Id.* at 358-59. The restraint in *Wilk* was just as "naked" as those in *NCAA* and *Indiana Federation*.

have had any unreasonable effect in any way different from thousands of similar arrangements. While petitioners alleged that those common clauses unreasonably restrained trade, petitioners failed by admissible evidence to show that market conditions were such that these otherwise common and lawful provisions had some uncommon or prohibited effect. That effect cannot be shown without market analysis, and *NCAA*, *Indiana Federation* and *Wilk*, all of which actually involved "naked" restraints, did not eliminate that requirement. This case is not in conflict with any of the precedent petitioners cite.[5]

Finally, petitioners argue that such market structure proof as they did offer was sufficient to satisfy Sherman Act standards. The case law establishes, however, that proof of relevant markets must be based on admissible evidence, and that testimony from experts must conform to the Federal Rules of Evidence. The speculative and conclusory testimony and affidavits from purported experts that petitioners offered failed to satisfy their burden in resisting respondents' motion for summary judgment.

The artificial market petitioners tried to prove consisted of the particular form of course they took, offered at the specific time of year and at the specific place at which they took their course. R3-41A-6. Petitioners' first expert,

[5] Petitioners attempt, as an apparent afterthought, to resurrect a conspiracy to monopolize claim in this portion of their argument. Their effort merits no attention because, in addition to failing to produce any competent evidence as to market structure, petitioners failed to offer evidence of conspiracy (*see* part I), specific intent to monopolize or overt acts in furtherance of any supposed conspiracy. *See generally American Tobacco Co. v. United States*, 328 U.S. 781 (1964), requiring proof of all of these elements.

Dr. Henry, attempted to define a market so narrow as to include only 181 potential customers, even though the evidence showed that bar review courses were offered statewide. *Id.* The Eleventh Circuit properly joined the district court in rejecting the proffered testimony as conclusory, and unsupported by competent analysis. *Palmer*, 874 F.2d at 1427-28. The petitioners' second "expert" was their own counsel, who offered his own self-serving opinions, which were in turn based on a survey he conducted without establishing the competence of the survey, and which was inadmissible under even the most relaxed evidentiary standards.[6] The Eleventh Circuit followed well-established authority in holding that these expert affidavits were without evidentiary value. *See American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985) (rejecting "expert" affidavit by the same Dr. Henry petitioners utilized in this case).

The implausibility of the market the petitioners claimed, and the unsurprising lack of competent evidence to support the existence of such a market, warranted summary judgment. The issue of the adequacy of plaintiffs' proof on this point raises no issue that merits this Court's consideration on certiorari.

[6] The third "expert" the petitioners "offered" was the economist their counsel had retained in the first lawsuit, but chose not to use again in this lawsuit. His testimony was in the record only because petitioners filed a copy of his deposition from the first case in this case. That testimony addressed a time frame not at issue in this case, and in fact contradicted petitioners' position here because that expert advocated the existence of an alleged statewide market, not the artificial one time of year, one place market the petitioners sought to prove in this case. Kamerschen Dep., *passim*.

III. NO EXERCISE OF THE COURT'S SUPERVISORY POWER OVER THE ELEVENTH CIRCUIT IS WARRANTED.

Contrary to petitioners' claim, the Eleventh Circuit's application of summary judgment standards was consistent with those set forth by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); and *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515 (1988). Petitioners object to the Eleventh Circuit's rejection of their attempt to satisfy their burden of surviving respondents' summary judgment motion by relying on self-serving, conclusory speculation. Petitioners simply had no admissible evidence to support their claims that the 1982 license agreement, or respondent's actions under that agreement, violated the Sherman Act.

Petitioners' final suggestion that the two judges on the panel who disagreed with the petitioners must not have reviewed the full record because their principal residences are not in Atlanta where the Eleventh Circuit maintains its case files, and because the Eleventh Circuit rules preclude the submission of appendices on appeal, is an unwarranted attack on the Eleventh Circuit. Their

challenge provides no colorable reason for even considering grant of certiorari in this case.[7]

[7] Petitioners' questionable speculation about the adequacy of the panel's actual review of the record is of no relevance here because the dissenting judge obviously reviewed and brought to the attention of the two other panel members the version of the purported "evidence" that petitioners argue was not considered, and because petitioners were granted leave to file (by Order dated June 28, 1989), and did file, an appendix containing the purported "evidence" with their petition for rehearing.

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

Of Counsel:
KEVIN E. GRADY
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

Attorneys for Respondents
BRG of Georgia, Inc.,
Bar Review Group, Inc.,
BRG Publications, Inc.,
and Ronald O. Pelletier

Counsel of Record
LEE TRAMMELL NEWTON, JR.
JONES, DAY, REAVIS & POGUE
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
(404) 521-3939

Of Counsel:
TRAMMELL E. VICKERY
TROUTMAN, SANDERS,
LOCKERMAN & ASHMORE
1200 Candler Building
Atlanta, Georgia 30303

Attorneys for Respondent
Harcourt Brace Jovanovich
Legal and Professional
Publications, Inc.

(3)

No. 89-1667

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Jay Palmer, et al.,
Petitioners,
v.

BRG of Georgia, Inc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

John C.Butters
(Counsel of record)
P.O. Box 7129
Atlanta, Georgia
30357-0129
(404) 872-5693

Of Counsel:

James F. Ponsoldt
Professor of Law
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5209

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PETITIONERS' REPLY IN SUPPORT
OF CERTIORARI

The Respondents' Brief In Opposition misstates the record, fails to respond to major conflicts among the Eleventh and other circuits, and fails to acknowledge the lengthy dissenting opinion below, identifying the disagreements in and holdings of the lower court for which the petitioners seek review.

I. THE CONTINUING CONSPIRACY BETWEEN DEFENDANTS BEGAN IN 1980 AND IS "HORIZONTAL," AS THE LOWER COURTS

AND DISSENT RECOGNIZED.

The Respondents' Brief In Opposition flagrantly misstates the nature of this case and the holding below:

> The litigation which the petitioners now seek to have reviewed involves a challenge to respondents' alleged conduct after execution of a new license agreement in 1982. (Brief in Opp. p. 2).
>
> ...
>
> ...The petitioners wrongly assume, or simply assert, that the Eleventh Circuit's opinion addresses relationships between horizontal competitors. (Brief in Opp. p. 5).
>
> ...
>
> The Eleventh Circuit's opinion does nothing more than reaffirm well-established law that vertical arrangements are to be tested under the rule of reason. (Brief in Opp. p. 6).

To the contrary, as the courts below found, the respondents launched their conspiracy to raise price and allocate markets in 1980 when they met privately as direct competitors. The district

court expressly found: "In 1979, BRG and Harcourt competed in Georgia. ... [I]n early 1980, Messrs. Conviser and Pelletier got together. At this time Harcourt was still selling in Georgia." (Pet. App. C-138, 139). Such a finding is based upon HBJ's answer to the complaint, which specifically acknowledges that a horizontal relationship existed.[1] Respondents' argument that their horizontal conspiracy became vertical because it transformed a horizontal competitive relationship into a profit sharing vertical relationship is, as Judge Clark recognized, "simply disingenuous and meritless." (Pet. App.

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[1] The Brief in Opp. (page 3), itself, states that the complaint in this case "made no reference at all to" the 1982 contract modification. Respondents have thus taken inconsistent positions regarding the focus of this litigation.

A-85).

Moreover, the lower court holdings which the petitioners seek to have reviewed are not limited to the 1982 contract. The court below endorsed the legal conclusion that, since "neither the 1980 nor the 1982 agreement explicitly addressed the factor of price" (Pet. App. A-35), the per se rule for price fixing did not apply. The court also endorsed the holding that "neither agreement between BRG and HBJ constituted the kind of market or customer allocation agreement which has been recognized as a basis for per se liability" because "this was not a situation where competitors divided up a market in which both were doing business, each taking a portion of the market," (Pet. App. A-36). As the Justice Department's amicus brief below

asserted, that holding is "wrong as a matter of law, economics, and policy." (Amicus Brief, pp. 2-3). The Court did not delete or modify these holdings, which remain the law of the Eleventh Circuit for future cases.

II. THE CLEAR CONFLICT AMONG THE CIRCUITS CONCERNING THE NEED TO OBTAIN AND SUBMIT STRUCTURAL MARKET DEFINITION EVIDENCE REQUIRES RESOLUTION.

In addition to rejecting the claims of per se liability, the lower courts also rejected the alternative theories of Sherman Act liability -- "rule of reason" section one, and "conspiracy to monopolize" section two. The lower courts held that the petitioners failed to prove relevant geographic and product markets and that such proof was mandatory. (Pet. App. A-45, 46, 55, 59).

As observed in the petition, the

Ninth Circuit recently has held that specific structural proof of market definition is not mandatory in a rule of reason case, E.W. French & Sons, Inc. v. General Portland, Inc., 885 F.2d 1473, at 1404 (1989).[2] The Tenth Circuit has recently held that specific structural proof of market definition is not mandatory in a conspiracy to monopolize case, Monument Builders v. American Cemetery Association, 891 F.2d 1473, 1484 (1989).

Respondents have not addressed these conflicts with the Eleventh Circuit. The question of the necessity of obtaining and evaluating complex economic

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Even more recently the Tenth Circuit has issued an opinion agreeing with the Ninth Circuit on this issue. See, Reazin v. Blue Cross and Blue Shield of Kansas, 899 F.2d 951, 968 fn. 24 (10th Cir. 1990)

structural evidence in these categories of antitrust cases should be resolved authoritatively by this court.

III. THE LOWER COURTS' FAILURE TO ACKNOWLEDGE THE EXISTENCE OF PLAINTIFFS' EVIDENCE IN OPPOSITION TO SUMMARY JUDGMENT REQUIRES SUPERVISION.

Contrary to Respondents' suggestion, the lower courts did not consider and reject plaintiff's evidence submitted in opposition to summary judgment. As Judge Clark recognized, the lower courts simply disregarded the evidence altogether with no explanation. The defendants presented no conflicting theory or evidence of market definition in opposition to the voluminous evidence presented by plaintiffs, which included two expert market surveys, consumer questionnaires, consumer affidavits, and affidavits of economists who had evaluated the data and

market information.

Petitioners urge that this Court not condone the granting of summary judgment in a case involving significant continuing consumer injury when, as the record and the dissenting opinion below make clear, there has been no evaluation by the Court of the evidence in the record. (Pet. App. AS-121-127).

In his annual survey for the Mercer Law Review, a partner at the King & Spalding law firm condemns all aspects of the majority opinion in Palmer, and concludes stating: "...[T]he decision in Palmer, could itself be enough to discourage any potential plaintiff or attorney from bringing an antitrust action in the Eleventh Circuit." See, 1989 Eleventh Circuit Survey, Antitrust, by Michael Eric Ross, to be published

Summer 1990, Mercer Law Review.

This Court has just confirmed that the primary concern of the antitrust laws is to prevent injury to consumers, especially when that injury is caused by an agreement to raise price, as in this case. See. Atlantic Richfield v. U.S.A. Petroleum, __S.Ct.__, CCH Trade Reg. ¶ 69019 (May, 1990). The opinion below undermines that concern and should not be allowed to stand.

This case may be appropriate for summary reversal and remand. See, e.g., Catalano, Inc. v. Target Sales, Inc., 446 U. S. 643 (1980). (Supreme Court summarily reversed a decision holding that an agreement between beer wholesalers to discontinue selling beer on credit does not constitute per se illegal price fixing).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

John C. Butters
(Counsel of record)
P.O. Box 7129
Atlanta, GA
30357-0129
(404) 872-5693

Of Counsel:
James F. Ponsoldt
Professor of Law
University of Georgia
School of Law
Athens, GA 30602
(404) 542-5209

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No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAY PALMER, ET AL., PETITIONERS

v.

BRG OF GEORGIA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL BOUDIN
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES M. SPEARS
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether the court of appeals erroneously restricted the scope of the per se rule of antitrust liability applicable to agreements between horizontal competitors by holding that (a) such an agreement is not per se unlawful price fixing unless the competitors agree on a price to be charged; or (b) such an agreement is not per se unlawful market allocation if the competitors merely allocate markets between them rather than dividing some single market in which both did business.

2. Whether disputed issues of fact were improperly resolved on summary judgment in this case.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent Harcourt Brace Jovanovich Legal and Professional Publications (HBJ) is the nation's largest provider of bar review materials and lecture services, selling comprehensive bar review courses directly or through licensees in 40 states under the trade name BAR/BRI. 874 F.2d 1417, 1429;[1] Pet. App. 175. It began selling bar review courses in Georgia in 1973. 874 F.2d at 1418. Respondent BRG of Georgia, Inc., and its predecessor, Bar Review Group, Inc., have offered a comprehensive review course to Georgia bar applicants

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[1] Because of typographical errors in the petitioners' Appendix, we cite to the reported opinion of the court of appeals.

since 1976. *Id.* at 1428; Pet. App. 136 & n.50. By 1979, HBJ and BRG were the dominant providers of bar review courses to University of Georgia students. 874 F.2d at 1419; *id.* at 1429, 1440. In addition, both HBJ and BRG marketed their courses statewide and offered them at various locations, including Athens, Atlanta, and Macon. 874 F.2d at 1429 n.4; Pet. App. 142.

Competition, including price competition, between the two firms was vigorous. BRG in 1979 was receiving free written materials from the West Publishing Company relevant to the multistate portion of the bar examination; this allowed BRG to charge relatively low prices for its course. 874 F.2d at 1418. HBJ lowered its prices in response to BRG's prices, with the result that, according to Richard Conviser, chairman of HBJ's board of directors, HBJ "lost $45,000 on revenues of $120,000 without accounting for overhead." *Id.* at 1418. Also according to Conviser, HBJ in 1979 decided to withdraw from the Georgia market. *Ibid.* Nothing in the record other than Conviser's statements in subsequent litigation evidences this decision, however, and apparently HBJ continued selling a course to be offered in mid-1980. *Id.* at 1429; Pet. App. 139.

In early 1980, Conviser and respondent Pelletier, owner of BRG, had a series of meetings.[2] At their first meeting, they discussed the possibility of HBJ's purchasing BRG or BRG's purchasing HBJ's Georgia assets; the second meeting added the possibility of a licensing arrangement; the third focused on licensing. 874 F.2d at 1429 & n.5.

[2] The rivalry between BRG and HBJ was "rancorous and vitriolic," in Judge Clark's terms. 874 F.2d at 1429. In prior litigation, Conviser testified that he and Pelletier met to discuss "this problem," which he explained meant "whatever was going on down here in this market was just the ugliest thing I have ever seen with these accusations and counter accusations, and we have got to do something about this and sort of reach an accord." Plaintiffs' Statement of Material Facts To Which Plaintiffs Contend There Is No Genuine Issue To Be Tried, Attachment 1, at 38.

These meetings resulted in a written agreement (the 1980 agreement) that ended competition between HBJ and BRG. The 1980 agreement gave BRG an exclusive license to market HBJ's multistate bar review materials in Georgia as part of BRG's course and to use HBJ's BAR/BRI trade name in Georgia. 874 F.2d at 1418. In return, HBJ would receive $100 per student enrolled, plus 40% of the amount charged over $350. *Id.* at 1429. Moreover, "HBJ agreed that it would no longer offer a bar review course in Georgia and that it would not compete with BRG in Georgia. BRG agreed not to compete with HBJ outside Georgia." *Id.* at 1418. Immediately following this agreement, HBJ withdrew from the Georgia market and "the price of BRG's course skyrocketed [from] $150 to over $400." Pet. App. 140.

In 1982, a group of Georgia law students brought an antitrust class action against BRG and HBJ; the suit was settled, with partial refunds paid to the class members. 874 F.2d at 1419. While the suit was pending, BRG and HBJ executed a new agreement (the 1982 agreement), which according to its terms superseded the 1980 agreement. The new agreement made BRG's license to use HBJ's multistate materials non-exclusive, and it did not include covenants not to compete. However, like the 1980 agreement, it provided that BRG would have an exclusive license to use the name BAR/BRI in Georgia.[3] Since execution of the 1982 agreement, "HBJ has not competed with BRG in Georgia nor licensed its multistate materials for use by any other Georgia bar review course." *Ibid.*

[3] The district court opinion, as reproduced in the appendix to the petition for certiorari, contains a serious typographical error. Referring to the 1982 agreement, the appendix reproduces the following sentence: "It does not reflect that BRG purchases the multi-state materials from Harcourt, pays [H]arcourt a fee, and uses Harcourt's trade name 'BAR/BRI.'" Pet. App. 173. The word "not" does not appear in this sentence in the district court opinion of July 8, 1987. See D. Ct. Op. 4.

2. On November 4, 1985, petitioners—Georgia law students not part of the class in the prior litigation—brought this action, purportedly on behalf of a class of those who had contracted to take BRG's bar review course in Athens, Georgia in preparation for Georgia Bar examinations to be administered after June 14, 1985. The nine-count complaint alleged numerous violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Count I charged that beginning "at a time believed to be as early as March, 1980, and continuing to the present day," respondents had conspired in restraint of trade, *inter alia*, "to increase and fix the price charged by BRG for its bar review course, and to allow [HBJ] to share, directly and indirectly, in BRG's increased bar review profits," and in particular "to increase the full tuition rate for BRG's bar review course * * * from approximately one hundred dollars ($100.00) to approximately four hundred and eighty-five dollars ($485.00)" (Compl. paras. 43-44), in violation of Section 1 of the Sherman Act. Count II charged that, in the same time period, respondents had conspired to restrain the sale of bar review courses nationwide, by, *inter alia*, dividing among themselves markets, customers, and territories (*id.* paras. 50-51), in violation of Section 1 of the Sherman Act.[4]

On petitioners' motion for partial summary judgment as to the Section 1 counts and respondents' motion for

[4] Counts III and IV alleged that the defendants had engaged in a boycott and concerted refusal to deal and had created an unreasonable joint venture. Petitioners do not here renew their contention, rejected by the court of appeals, that the district court erred in granting summary judgment to respondents with respect to these counts. Counts V through VII charged conspiracy to monopolize, attempt to monopolize, and monopolization in Georgia and Counts VIII and IX charged conspiracy to monopolize and attempt to monopolize nationwide. Of the Section 2 counts, petitioners apparently renew their challenge only to the grant of summary judgment to respondents on Counts VI, conspiracy to monopolize in Georgia. See Pet. i, 43-46.

summary judgment, the district court held that the per se rule of Section 1 antitrust liability did not apply. It found that "the arrangement between BRG and [HBJ] does not fit within any recognized category of per se liability." Pet. App. 148. As to Count I, the court explained that "the agreement is not a classic form of price fixing where two competitors agree what price they will charge for their products. On the contrary, neither agreement explicitly addresses the factor of price, and [HBJ] has never had any right under either the 1980 or 1982 agreement to be consulted about the price of the BRG course." *Ibid.* As to Count II, the court explained:

> Neither agreement between BRG and [HBJ] constitutes the sort of market or customer allocation agreement which has been recognized as a basis for per se liability. *Cf.* [*United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972)]. This is not a situation where competitors divided up a market in which both have previously done business, each taking a portion of that market. BRG has never done business outside the state of Georgia, and nothing in the record suggests that it ever intended to do so. [HBJ] as noted has done business virtually nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and [HBJ]. Thus, the only market ever claimed by both Defendants is the state of Georgia, and clearly the state of Georgia was not divided up under either the 1980 or 1982 agreements.

Id. at 149-150.

The court permitted petitioners to present further evidence to establish a violation of Section 1 under the rule of reason. After reviewing the submissions, the court found that there was still insufficient evidence of a "present anticompetitive effect in a relevant geographic and product market" to establish a rule of reason violation. Pet. App. 177.[5]

[5] The court also granted summary judgment to respondents with respect to Counts III and IV.

With respect to petitioners' Sherman Act Section 2 claims, the court granted summary judgment to respondents on the ground that what it believed to be petitioners' sole evidence of product and geographic market was "without evidentiary value." Pet. App. 157-158. The district court also found that, with respect to claims of monopolization and attempted monopolization in Georgia, petitioners' only effort to present evidence of monopoly power was "clearly insufficient." Pet. App. 159.

3. A divided panel of the court of appeals affirmed. With respect to the claim of a per se Section 1 violation, the majority noted respondents' contention that "they were in a vertical supplier-retailer relationship at the time of the first license agreement; had executed a second agreement; and have submitted affidavits that they were free to compete with each other." 874 F.2d at 1423. The majority summarized the district court's opinion and concluded that "[t]he district court's analyses of these issues are thorough and legally sound." *Id.* at 1424.

Judge Clark, dissenting, pointed out that BRG and HBJ were horizontal competitors at the time they entered the 1980 agreement and that they remained "at least *potential competitors*." 874 F.2d at 1433. He concluded that the district court had erred in holding that to prove a per se violation under a geographic market allocation theory, petitioners had to show "that BRG and HBJ have sub-divided some relevant market in which they previously competed" (*ibid.*), since there was no legal distinction between market "division" and market "allocation." He also concluded that the district court had erred in holding that per se unlawful horizontal price fixing required an explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices. *Id.* at 1434. Finally, Judge Clark dissented from the majority's holdings that respondents were entitled to summary judgment on petitioner's rule of reason and monopolization claims. *Id.* at 1436-1441.

4. The court denied both rehearing and rehearing en banc.[6] Pet. App. 130-133. The panel, however, modified its opinion by adding the following (*id.* at 132-133):

> We agree with the district court that the modified agreement (1982) is not a market allocation agreement to which per se liability applies. First, the agreement is not a "naked agreement" between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors. HBJ's affidavit states that it is no longer a competitor in the Georgia market. The appellants have failed to produce evidence to the contrary. In the absence of evidence other than the affidavit on this issue, we cannot conclude that HBJ is doing business in Georgia.

Judge Clark adhered to his dissent.

DISCUSSION

The court of appeals' opinion leaves us uncertain of its reasons for affirming the district court's grant of summary judgment to respondents on petitioners' claims under the per se rule of antitrust liability. We discern several possible reasons in the opinion. However, all of these reasons are in sharp and unexplained conflict with clearly established law. Because those conflicts are so clear and raise no unsettled question of law, this case does not merit plenary review. Nevertheless, since on the most plausible reading the opinion below substantially restricts the scope of the per se rule and therefore poses a threat to proper enforcement of the antitrust laws, we suggest that the Court grant certiorari and summarily reverse.

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[6] The United States filed a brief in support of the suggestion of rehearing en banc. It contended that the court had erred in holding that the per se rule was not applicable where a naked agreement not to compete between horizontal competitors merely allocated, rather than divided, territory. The United States, however, took no position on the merits of plaintiffs' case.

1. If taken to apply to agreements between horizontal competitors, the district court's statements limiting per se liability under the Sherman Act for price-fixing or market allocation, repeated and endorsed by the court of appeals, are plain legal error. In particular, the conclusions of the courts below that a per se price-fixing violation requires an agreement that "explicitly addresses the factor of price" (Pet. App. 148) and that a market allocation agreement is not per se illegal if the parties do not divide up and continue to do business in any single market conflict with numerous decisions of this Court.

a. Petitioners allege an agreement between horizontal competitors not to compete, and we do not believe the appropriate resolution of this case turns on whether that agreement is properly characterized as price fixing or market allocation.[7] Nonetheless, the courts below purported to resolve the price-fixing claim, independently of the market allocation claim, on the incorrect ground that neither written agreement between the parties included a provision setting a specific price to be charged.

This Court long ago established that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). See also, *e.g.*, *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (horizontal agreement to terminate the practice of giving credit falls within the traditional per se rule against price fixing); *National Society of Prof. Engineers* v. *United States*, 435 U.S. 679 (1978) (horizontal agreement that interferes with setting of price by free market forces is illegal on its face). This is not to say that all agreements between horizontal competitors that have an

[7] The district court observed that petitioners' various theories of Sherman Act Section 1 liability were "improperly pled as separate counts. [Petitioners] have one cause of action for an alleged violation of § 1." Pet. App. 143 n.55.

effect on price are per se unlawful as price fixing. See, *e.g.*, *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (although horizontal competitors may have literally fixed a price, licensing arrangement is not per se unlawful where practice does not appear facially to be one that would always or almost always tend to restrict competition and decrease output and arrangement appears necessary to market the product at all). But to hold that an agreement between horizontal competitors to raise prices is not per se unlawful price fixing merely because there is no agreement on a specific price is simply wrong.[8]

b. More centrally, the courts below dramatically curtailed the scope of the per se rule against market allocation. Contrary to the district court's holding endorsed by the court of appeals, the per se rule applies equally to agreements allocating markets between horizontal competitors and to agreements dividing a market between horizontal competitors. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("market allocation" is per se offense); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 n.15 (1982) ("division of markets" is per se offense). In either case, the parties divide up territory, each agreeing not to compete in the territory assigned to the other. The agreement has an anticompetitive impact regardless of whether the parties split a market within which both do business, or whether they merely give one market to one and another market to the other (*i.e.*, agree to eliminate actual or potential competition).

[8] We do not suggest that any agreement between BRG and HBJ is, or is not, per se unlawful price fixing. Although petitioners clearly alleged an agreement specifically addressing price, it is less clear that they presented evidence of such an agreement. In our view, because petitioners' price-fixing theory appears not to be clearly distinct from their market allocation theory, resolution of this case should turn upon whether the courts below properly held that petitioners adduced sufficient evidence of a per se unlawful market allocation.

This Court has found territorial market division to be a per se offense without reference to whether any particular maket was divided among actual competitors. In *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972), the government challenged a "division of territories" that was the "product of agreement among actual or potential competitors." U.S. Br. at 18, *United States* v. *Topco, supra* (1971 Term). In fact, the agreement involved retail grocery chains "geographically . . . widely dispersed," which rarely operated in the same trading or marketing areas. Topco Associates Br. at 16, 19. The Court held the per se rule applicable because firms at the same level of the marketing structure had allocated territory among themselves. The Court nowhere suggested that its holding depended on whether particular marketing areas had been split among competitors.[9]

It is, therefore, plaintly wrong to hold that agreements that would be per se unlawful if they divided territory between horizontal competitors are not per se unlawful because they merely allocate territory between horizontal competitors.

2. Respondents do not attempt to defend the opinions below as correctly stating the law with respect to agreements between horizontal competitors. The suggest, rather, that the courts below meant their analyses to apply only to vertical, rather than to horizontal, agreements.[10] We have considered this suggestion as well as

[9] Chief Justice Burger dissented, viewing the restraint at issue as ancillary to a cooperative endeavor with a lawful purpose, 405 U.S. at 613 (Burger, C.J., dissenting), and courts of appeals have read subsequent decisions of this Court as effectively overruling *Topco* to the extent *Topco* can be said to hold ancillary market allocations per se unlawful. See, *e.g., Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). That aspect of *Topco*, however, has no bearing on our point here, which addresses simply the purported distinction between "allocation" and "division."

[10] The per se rule has a much narrower scope with respect to vertical agreements than to horizontal agreements. See, *e.g., Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 735-736 (1988) (vertical agreement not per se unlawful price fixing absent agreement on price or price levels); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical territorial restraints not per se unlawful). We do not address whether petitioners' showing was sufficient to avoid summary judgment on a per se theory of vertical price fixing.

the possibility that the courts below could have been referring only to horizontal restraints on price or territory that are ancillary to an agreement with a different purpose and primary effect. We have, however, been unable to find a basis for such alternative readings in the text of the opinions below and conclude that any such reading could not be correct unless the courts below improperly, and sub silentio, resolved disputed factual issues against petitioners in ruling on summary judgment.

a. Respondents contend that the court of appeals, and presumably the district court as well, simply did not "address[] relationships between horizontal competitors." Br. in Opp. 5. Their argument section, relying on the court of appeals' amendment to its opinion, suggests that they could not have been found to have entered any horizontal conspiracy because they were not in fact competitors in 1985. *Ibid.* Their "statement of the case" (*id.* at 2) suggests their argument below, namely, that HBJ had decided to withdraw from Georgia prior to the 1980 agreement, so that not even the 1980 agreement was between horizontal competitors. 874 F.2d at 1423, 1432. This contention, however, is insufficient to explain the language or result of the lower courts' analysis.

The courts below did not find that BRG and HBJ had ceased to be horizontal competitors prior to entering into the 1980 agreement. The district court found that the two firms competed in 1979 and that HBJ was still selling its bar review course in Georgia at the time Conviser and Pelletier "got together." Pet. App. 138-139. The court of appeals merely observed that Conviser had stated

in an affidavit that HBJ had decided to withdraw from the Georgia market prior to the 1980 agreement but added, as did the district court, that "no documentation of this decision has been offered." 874 F.2d at 1418; see Pet. App. 139.

Whatever may be the truth of the matter, Conviser's unsupported affidavit is not a sufficient basis for a court to find, on summary judgment, that HBJ was no longer a competitor of BRG by the time of the 1980 agreement. First, there was ample evidence to support a jury finding that HBJ had not withdrawn, or even firmly decided to withdraw, at that time. The district court, after all, found that HBJ was continuing to sell its bar review course in Georgia. In addition, after the alleged decision Conviser and Pelletier discussed HBJ's buying out BRG (see 874 F.2d at 1429 & n.5); this apparently conceded fact supports an inference that HBJ had not decided to withdraw from Georgia.[11] Second, even if HBJ had decided to withdraw from Georgia just prior to the 1980 agreement, it could not be said that HBJ and BRG, as a matter of law, were no longer horizontal competitors—unless the decision to withdraw were irrevocable. Moreover, even if such a decision were proven to be irrevocable, HBJ presumably remained capable of re-entering the Georgia market at any time and it continued to operate at the same marketing level as BRG outside of Georgia. Thus without resolving a disputed issue of fact against petitioners, the courts below could not have found that the 1980 agreement was vertical rather than horizontal.

In amending its opinion, the court of appeals found that HBJ and BRG "*are*" not horizontal competitors be-

[11] The 1980 agreement in fact specifically provides (in paragraphs 4.2, 4.3, and 4.5) that HBJ will offer certain courses in Georgia after the effective date of the agreement. The record indicates neither whether BRG's offerings were in the same relevant product market as these HBJ courses nor whether HBJ ever actually offered these courses in Georgia.

cause it was undisputed that HBJ "*is* no longer a competitor in the Georgia market." Pet. App. 132-133 (emphasis added). Since HBJ withdrew from Georgia following the 1980 agreement, this suggests the court did not view the 1982 agreement as between horizontal competitors. We question whether the 1982 agreement is properly treated as simply one between parties in a vertical relationship where, according to petitioners' theory (supported by sufficient evidence to withstand summary judgment), the parties ceased to be horizontal competitors as a result of a per se unlawful agreement not to compete.

More fundamentally, a finding that the 1982 agreement was not between horizontal competitors cannot in any event suffice to dispose of petitioners' per se case on summary judgment. Petitioners alleged a conspiracy beginning in 1980 and continuing at least until the time of the complaint, thus in effect resting their case on the 1980 agreement.[12] To be sure, respondents may have withdrawn from or abandoned their alleged conspracy in entering into their 1982 agreement. But as Judge Clark observed in dissent, the district court did not address this issue and thus "it is an unsettled factual issue whether the conspiratorial objectives manifest in the 1980 agreement between HBJ and BRG have continued despite the supposedly ameliorative modifications made in 1982." 874 F.2d at 1436 n.25. The panel majority did not address this question at all.[13]

[12] As respondents helpfully observe, the complaint "made no reference at all to the 1982 agreement." Br. in Opp. 3.

[13] In any event, we do not see how the court of appeals could have resolved this factual issue against petitioners as a matter of summary judgment. Although both BRG and HBJ denied they had any continuing understanding apart from the written 1982 agreement (Br. in Opp. 7), a jury would not be required to credit the denial, and there was sufficient evidence for a jury to conclude that there had been no withdrawal from the conspiracy allegedly entered into in 1980. As Judge Clark observed: "In the absence of proof of

b. In our brief in support of the suggestion of rehearing en banc, we observed that for purposes of its per se analysis, the court of appeals had considered the agreement to allocate markets in this case as if it were a naked agreement not to compete, unredeemed by any claim of integrative efficiencies.[14] Judge Clark, in dissent, termed the 1980 agreement a "blatant 'naked' restriction on output," noting that defendants had failed to provide evidence "of some procompetitive efficiency-enhancing virtue to their agreement." 874 F.2d at 1437. In amending its opinion, the court said that the "modified agreement (1982) * * * is not a 'naked agreement' between competitors to allocate the market." Pet. App. 132.

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withdrawal, the conspirators are presumed to continue in their conspiracy particularly where they continue to share the fruits of their conspiracy, in this case through the revenue-sharing provision in the 1980 and 1982 agreements." 874 F.2d at 1436 n.25. Moreover, the 1982 agreement itself makes it unlikely that HBJ would enter the Georgia market in competition with BRG, because any resulting price competition would reduce HBJ's revenues from its agreement with BRG and because HBJ could not use its well-known trademark in Georgia. *Id.* at 1435. Thus a jury could reasonably conclude that the 1982 agreement, far from evidencing withdrawal, reflects an intent to preserve the benefits of the conspiracy entered into in 1980.

[14] By a "naked" agreement, we mean an agreement that is not ancillary to any efficiency-producing integration of functions or assets by competitors. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). At the time BRG and HBJ agreed not to compete, they also entered into a licensing arrangement with respect to Georgia alone, thus establishing a new vertical relationship. If the agreement not to compete were ancillary to the licensing agreement, different issues would be presented. On this record, however, respondents did not establish on the basis of undisputed facts that the agreement not to compete was merely ancillary in this sense. Indeed, the facts might be interpreted to suggest that it was, instead, the licensing arrangement that was merely ancillary to the agreement not to compete.

If the court's amendment was meant to cure the flaws in the original per se analysis, it failed of that purpose. First, the amendment, which speaks only of the 1982 agreement, plainly does not say that the 1980 agreement was anything but a "naked agreement" not to compete, and, as we have explained, this case cannot properly be resolved on summary judgment as if the 1980 agreement had never existed. Second, the amendment fails to identify—and we are unable to find—evidence sufficient to conclude on summary judgment that even under the 1982 agreement, the licensing arrangement, rather than the elimination of competition, was the essence of the transaction. As Judge Clark concluded, there was no evidence of any efficiency enhancing purpose or effect. See 874 F.2d at 1437.

3. Although the court of appeals' treatment of the per se claims in this case is erroneous and apparently in conflict with this Court's long-standing precedents concerning the per se rule, we nevertheless do not urge plenary review. If, as we believe, the court of appeals did radically misinterpret and misstate governing precedent concerning the application of the per se rule to horizontal conspiracies, its errors are so clear as to require no further briefing or argument in this Court. Indeed, respondents make no attempt to defend the courts below with respect to anything they may have said about horizontal conspiracies and the per se rule. If, on the other hand, the court of appeals did not misapprehend established precedent concerning the per se rule, then it plainly misapprehended the standards for summary judgment—an error similarly too manifest to warrant plenary review. Moreover, we see no useful purpose to be served by further review of this case merely to resolve ambiguity concerning which path the courts below took in going astray.

Nevertheless, we believe the errors below concerning the scope of the per se rule should not stand uncorrected. Because the court of appeals' opinion can, and

likely will, be read to restrict very substantially the scope of the per se rule, it poses a threat to the proper enforcement, both private and public, of the antitrust laws.[15] Accordingly, we suggest that the Court grant the petition and summarily reverse and remand for further proceedings. We believe it would suffice for the Court to reiterate that a horizontal price-fixing agreement can be found even absent agreement on a specific price to be set, that market allocation, and not merely market division, by horizontal competitors is per se unlawful, and that courts do not properly resolve disputed questions of material fact on summary judgment.

4. In contrast to the court of appeals' holdings with respect to petitioners' per se claims, the court's holdings concerning petitioners' rule of reason and monopolization claims do not warrant further review. Petitioners claim that the court of appeals incorrectly held that petitioners were required to prove relevant markets through structural evidence and failed to do so. Petitioners assert that the affirmance of summary judgment for respondents on the rule of reason theory and conspiracy to monopolize claim rested on that holding.

a. The courts below indeed appear to have rested their dismissal of petitioners' conspiracy to monopolize claim at least in part on petitioners' failure to prove market structure. The district court noted a number of deficiencies in petitioners' proof, including the failure to consider whether written bar review materials and courses offered in locations outside Athens, Georgia, are within the relevant market. Pet. App. 156-157. Petitioners' disagreement with those conclusions raises at most the question whether the district court accurately assessed petitioners' proof of market definition; that question does not warrant further review.

Although petitioners contend that this case raises broader questions concerning the need to introduce evidence of market structure in a Section 2 conspiracy to monopolize case (see Pet. 43-45), we do not believe that this is an appropriate vehicle for addressing such questions. Petitioners' conspiracy to monopolize claim is essentially a restatement of their primary claim that respondents, horizontal competitors in 1980, conspired to restrain trade through an explicit market allocation and never withdrew from that conspiracy. That claim is more properly and directly considered under Section 1 where, if petitioners are correct, the agreement to allocate would be a per se violation and proof of market power would be unnecessary.

[15] See Ross, *1989 Eleventh Circuit Survey: Antitrust*, 41 Mercer L. Rev. 1217, 1225-1229 (1990).

b. With respect to the court of appeals' rejection of petitioners' rule of reason theory, it is difficult to discern the precise course of reasoning adopted by the court of appeals. See 874 F.2d at 1424-1428. As we have pointed out, insofar as the 1980 agreement was a "naked" agreement to allocate markets among competitors, it is per se unlawful and no further analysis under the rule of reason is necessary. The rule of reason becomes relevant only in analyzing respondents' contentions that the 1980 agreement was in essence a vertical licensing agreement, and that any horizontal features were merely ancillary.

Contrary to petitioners' contention, we do not find any explicit or implicit holding in the court of appeals' opinion (see 874 F.2d at 1424-1426) that petitioners were required to prove market structure in order to prevail on a rule of reason theory. Instead, we read both opinions below to rest at least in part on the courts' conclusions that petitioners failed to present sufficient evidence of anticompetitive effect—*i.e.*, that prices increased and/or output decreased as a result of the challenged conduct.[16] See *id.* at 1425-1426; Pet. App. 159-160, 172-175. In particular, the courts found petitioners' evidence of large

[16] Indeed, had the court of appeals required proof of market structure, as petitioners contend, its holding that such proof was deficient would have made discussion of petitioners' proof of anticompetitive effect unnecessary.

price increases inconclusive, since such increases could have been explained by increases in costs incurred in providing bar review courses. See 874 F.2d at 1425; Pet. App. 173-174. Having failed to find direct proof of anticompetitive effect, the courts below relied on petitioners' failure to introduce credible evidence of market structure to find that they had not made out a Section 1 violation on a rule of reason theory. Cf. *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986).

Because the court of appeals' result thus hinged on petitioners' perceived failure to present sufficient evidence of anticompetitive effect, petitioners' second question—"[w]hether a Sherman Act plaintiff in a Section One 'Rule of Reason' * * * case necessarily must submit structural evidence to prove specifically-defined markets" (Pet. i)—is not raised by the court of appeals' treatment of their rule of reason theory. Therefore, further review with respect to that question is not warranted.

5. Finally, petitioners contend that the court of appeals incorrectly described the contents of the summary judgment record and misapplied the applicable summary judgment standard. We agree that the court below appears to have erred; petitioners' allegations of explicit agreement and subsequent price increases constituted a sufficient showing to create a genuine issue of material fact with respect to the issue of anticompetitive effect.[17] Nonetheless, the court's error may well have been limited

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[17] Although a price increase of the magnitude alleged by petitioners *could* of course have been caused by increases in the cost of providing bar review courses, the only evidence of increased cost noted by the courts below was that West Publishing Company discontinued no-cost distribution of its written multistate materials. See 874 F.2d at 1425; Pet. App. 173-174. No evidence was noted concerning the price West intended to charge for those materials, nor did respondent introduce evidence concerning other costs of providing a bar review course before and after the 1980 agreement. In these circumstances, respondents are not entitled to summary judgment based on mere speculation about the causes of the cost increases.

to assessment of the facts offered in this particular case. Petitioners advance no credible basis for their contention (Pet. 46-55) that the error is symptomatic of wider problems affecting this or other courts of appeals. Plenary review to correct any error in assessing the facts in this particular case is therefore not warranted.

CONCLUSION

The petition for writ of certiorari should be granted with respect to the first question presented and the Court should summarily reverse and remand.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL BOUDIN
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

JAMES M. SPEARS
General Counsel
Federal Trade Commission

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No. 89-1667

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Jay Palmer, et al.,
Petitioners,
v.

BRG of Georgia, Inc., et al.,
Respondents.

PETITIONERS' RESPONSE TO THE AMICUS CURIAE BRIEF OF THE UNITED STATES

John C. Butters
(Counsel of Record)
P.O. Box 7129
Atlanta, Georgia
30357-0129
(404) 872-5693

Of Counsel:
James F. Ponsoldt
Professor of Law
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5209

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Jay Palmer, et al.,
Petitioners,

v.

BRG of Georgia, Inc., et al.,
Respondents.

PETITIONERS' RESPONSE TO THE AMICUS CURIAE BRIEF OF THE UNITED STATES

Introduction

Petitioners are gratified that both the Department of Justice and the Federal Trade Commission agree that this Court should grant the petition for certiorari, summarily reverse the court of appeals'

decision, and remand the case for further proceedings, Brief for the United States as Amicus Curiae at pp. 16, 19: "Because the Court of Appeals' opinion can, and likely will, be read to restrict very substantially the scope of the per se rule, it poses a threat to the proper enforcement, both public and private, of the antitrust laws," id., at 16 (citation omitted).

Petitioners' "Reply in Support of Certiorari," at pg. 9, citing Catalano Inc. v. Target Sales, Inc., 446 U.S. 643 (1980), had recognized the appropriateness of summary reversal in this case since, as the United States also has concluded, the court of appeals' majority opinion is "in sharp and unexplained conflict with clearly

established law," Brief for the United States, at p. 7.

Petitioners submit this response for two purposes: First, to suggest clear terms for this Court's Order of remand which would be appropriate and promote an efficient resolution of this litigation; and, second, to reemphasize the importance to private antitrust enforcement of the second and third questions presented by the petition[1]. The court of appeals decision in its entirety should be reversed and remanded.

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[1] Since the United States in its enforcement role is most directly concerned about the lower courts' interpretations of the per se rule under Section One of the Sherman Act, the government perhaps has slighted the importance of the second and third questions to private antitrust enforcement.

Discussion

1. As the government's amicus brief notes, pp. 4-5, petitioners moved in the district court for partial summary judgment, limited to the question of liability, on the price-fixing and market allocation counts, under Section One of the Sherman Act. On appeal to the Court of Appeals, petitioners contended that defendants had not met their burden of opposing summary judgment, because they failed to raise any genuine issue of material fact in their affidavits and briefs in opposition to plaintiffs' motion.

Plaintiffs' Section One price-fixing and market allocation case was evidenced by, among other things, the terms of a written contract, defendants' admissions

in their pleadings regarding their competitive relationship and private discussions in 1980, and marketing documents describing the subsequent and continuing effect upon price, output, and competition. Defendants did not and could not contest any of that evidence. Instead, defendants advanced two legal arguments: that their conspiracy was not the kind of price-fixing or market allocation subject to the per se rule, and that their conspiracy was vertical, rather than horizontal, because their agreement required HBJ to cease selling at retail in Georgia.

As the amicus brief of the United States recognizes, those arguments are not supportable, Brief of the United States, pp. 7-10, 12: the per se rule

plainly does apply to respondents' combination, and the acknowledged competition between the conspirators at the time of their 1980 meetings renders their combination "horizontal" as a matter of law. See, e.g., Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

As effectively acknowledged in the Brief of the United States, the only "genuine" issue which defendants theoretically might have advanced in opposition to Summary Judgment -- a mixed question of law and fact -- would have been whether their 1982 contract modification constituted a withdrawal or abandonment of their unlawful conspiracy. The defendants, however, never raised such a question in opposition to

petitioners' motion for summary judgment (See, Defendants' Memorandum In Opposition To Plaintiffs' Motion For Partial Summary Judgment, filed May 14, 1986, R2-15), and the issue was never addressed by the district court or court of appeals majority. In view of the defendants' failure to raise a genuine factual issue, which was their obligation, the district court should have granted petitioners' motion as a matter of law, and the court of appeals erred in not so concluding, Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The amicus brief of the United States does not make clear exactly what "further proceedings," Brief, p. 16, are appropriate in this case and implies that it "would suffice" if this Court simply

reverses and remands after confirming the applicable principles of <u>per</u> <u>se</u> liability, presumably leaving it to the court of appeals to decide what steps to take. However, in light of the existing uncertainty in the court of appeals, where the deciding vote in the panel decision was cast by a visiting district court judge, litigation efficiency would be promoted if the district court were directed specifically to reconsider whether the defendants adequately carried their burden in responding to plaintiffs' summary judgment motion. This Court, perhaps, should even go one step further, in light of the unambiguous defect of defendants' failure to assert withdrawal, and direct that plaintiffs' motion be granted.

2. The United States advocates granting certiorari on the first question presented in the petition for certiorari (amicus brief, pg. 19). The government does not argue, however, that the court of appeals majority correctly decided any issue. In the interest of uniform private antitrust enforcement, petitioners urge that this Court grant certiorari with respect to each of the three questions. This Court may wish to endorse the dissenting opinion of Judge Clark, below, Pet. App. 61-129, as an accurate statement of the law.

If this Court decides to grant plenary review of the case, contrary to the government's advice, it should do so with respect to all three questions presented. First of all, as the United

States, itself, recognizes, amicus brief, pp. 11, 12, 16, 18, resolution of the substantive Sherman Act issues may be affected by application of the Summary Judgment Rule. The panel majority's failure to apply the correct summary judgment standard, and its failure to consider uncontradicted evidence submitted by petitioners in opposition to summary judgment, as described in the dissenting opinion below, make this Court's resolution of any ambiguities in this dispute much simpler.

Second, the United States does not acknowledge that petitioners relied upon Rule 10.1(a) of the Rules of this Court -- authorizing this Court to exercise its supervisory authority over the lower federal courts -- as a basis for granting

review of the summary judgment issues presented. Thus, even though those issues may not be as important to the government's law enforcement efforts as are the issues subsumed within question one, the appropriateness of this Court's review is equally apparent: the glaring disparity in the descriptions of the record between the majority and dissenting opinions demonstrates that something was seriously amiss in the court of appeals, warranting correction.

The summary judgment standard applied by the majority -- requiring the party opposing summary judgment to eliminate all conflicting hypotheses of innocence in order to obtain a jury trial -- is not consistent with Rule 56, F.R.Civ.P. or the Seventh Amendment.

See, most recently, <u>In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation</u>, 906 F.2d 432, 441, (9th Cir. 1990) ("... [T]he concerns highlighted in <u>Matsushita</u>, and <u>Monsanto</u> arise only in the context of whether to permit inferences from circumstantial evidence. Accordingly, the <u>Matsushita</u> standards do not apply when the plaintiff has offered direct evidence of conspiracy."). See, also, Sullivan and Hovenkamp, 1990 Supplement to <u>Antitrust Law, Policy, and Procedure, Cases Materials, Problems</u>, The Michie Company (1990), at pg. 51. Sullivan and Hovenkamp, commenting upon the lower Court's decision in this case, recognize its troublesome and irrational

implications.[2]

<u>Conclusion</u>

This Court should grant certiorari and summarily reverse and remand with instructions that the District Court determine whether defendants raised a genuine issue of material fact in opposition to plaintiffs' motion for

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[2]"Clearly, the <u>Matsushita</u> summary judgment standard was designed for plaintiffs who must prove an agreement on the basis of circumstantial evidence. What if there is explicit evidence of a written agreement? The Eleventh Circuit has found an <u>explicit</u> territorial division agreement to be legal, because the resulting conduct (one party operating in one territory and the second party in a different territory) was as consistent with competition as with collusion. By that reasoning, an explicit price fixing agreement would be legal too, would it not? A group of people charging the same price is as consistent with perfect competition as it is with collusion. See <u>Palmer v. BRG of Georgia</u>, 874 F.2d 1417 (11th Cir. 1989)."

partial summary judgment. Alternatively, this Court should order, based upon the pleadings and record in the District Court, that plaintiffs' motion for partial summary judgment be granted.

Respectfully submitted,

John C. Butters
(Counsel of record)
P.O. Box 7129
Atlanta, GA
30357-0129
(404) 872-5693

Of Counsel:

James F. Ponsoldt
Professor of Law
University of Georgia
School of Law

SUPREME COURT OF THE UNITED STATES

JAY PALMER ET AL. *v.* BRG OF GEORGIA, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-1667. Decided November 26, 1990

PER CURIAM.

In preparation for the 1985 Georgia Bar Examination, petitioners contracted to take a bar review course offered by respondent BRG of Georgia, Inc. (BRG). In this litigation they contend that the price of BRG's course was enhanced by reason of an unlawful agreement between BRG and respondent Harcourt Brace Jovanovich Legal and Professional Publications (HBJ), the Nation's largest provider of bar review materials and lecture services. The central issue is whether the 1980 agreement between respondents violated § 1 of the Sherman Act.[1]

HBJ began offering a Georgia bar review course on a limited basis in 1976, and was in direct, and often intense, competition with BRG during the period from 1977–1979. BRG and HBJ were the two main providers of bar review courses in Georgia during this time period. In early 1980, they entered into an agreement that gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name "Bar/Bri." The parties agreed that HBJ would not compete with BRG in Georgia and that BRG would not com-

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[1] Section 1 of the Sherman Act, 26 Stat. 209, as amended and set forth in 15 U. S. C. § 1, provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

We do not reach the other claims alleged in petitioners' nine-count complaint, including violations of § 2 of the Sherman Act, 15 U. S. C. § 2.

pete with HBJ outside of Georgia.[2] Under the agreement, HBJ received $100 per student enrolled by BRG and 40% of all revenues over $350. Immediately after the 1980 agreement, the price of BRG's course was increased from $150 to over $400.

On petitioners' motion for partial summary judgment as to the § 1 counts in the complaint and respondents' motion for summary judgment, the District Court held that the agreement was lawful. The United States Court of Appeals for the Eleventh Circuit, with one judge dissenting, agreed with the District Court that *per se* unlawful horizontal price fixing required an explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices. The Court of Appeals also agreed with the District Court that to prove a *per se* violation under a geographic market allocation theory, petitioners had to show that respondents had subdivided some relevant market in which they had previously competed. 874 F. 2d 1417 (1989).[3] The Court of Appeals denied a petition for rehearing en banc that had been supported by the United States. 893 F. 2d

[2] The 1980 agreement contained two provisions, one called a "Covenant Not to Compete" and the other called "Other Ventures." The former required HBJ not to "directly or indirectly own, manage, operate, join, invest, control, or participate in or be connected as an officer, employee, partner, director, independent contractor or otherwise with any business which is operating or participating in the preparation of candidates for the Georgia State Bar Examination." Plaintiffs' Motion for Partial Summary Judgment, Attachment E, at 10. The latter required BRG not to compete against HBJ in states in which HBJ currently operated outside the state of Georgia. *Id.*, at 15.

[3] In dissent, Judge Clark explained that in his view HBJ and BRG were capable of engaging in *per se* horizontal restraints because they had competed against each other, and then had joined forces. He believed the District Court's analysis was flawed because it had failed to recognize that the agreements could be price-fixing agreements even without explicit reference to price and because it had failed to recognize that allocation, rather than subdivision, of markets could also constitute a *per se* antitrust violation.

293 (1990).[4]

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), we held that an agreement among competitors to engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful, even though there was no direct agreement on the actual prices to be maintained. We explained that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Id.*, at 223. See also *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) *(per curiam); National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978).

The revenue-sharing formula in the 1980 agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other in 1980, indicates that this agreement was "formed for the purpose and with the effect of raising" the price of the bar review course. It was, therefore, plainly incorrect for the District Court to enter summary judgment in respondents' favor.[5] Moreover, it is equally clear that the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them.

In *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), we held that agreements between competitors to allocate territories to minimize competition are illegal:

> "One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to

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[4] The United States, as *amicus curiae*, had urged the court to adopt the views of the dissent.

[5] See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor").

minimize competition. . . . This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' Such limitations are *per se* violations of the Sherman Act." *Id.*, at 608 (citations omitted).

The defendants in *Topco* had never competed in the same market, but had simply agreed to allocate markets. Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other.[6] Thus, the 1980 agreement between HBJ and BRG was unlawful on its face.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[7]

It is so ordered.

JUSTICE SOUTER took no part in the consideration or decision of this case.

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[6] See *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 344, n. 15 (1982) ("division of markets" is *per se* offense).

[7] In 1982, in connection with the settlement of another lawsuit, respondents made certain changes in their arrangement. Because the District Court found that the 1980 agreement did not violate § 1 of the Sherman Act, it did not address whether the 1982 modified agreement constituted a withdrawal from or abandonment of the conspiracy. In *United States* v. *Kissel*, 218 U. S. 601 (1910), we held that antitrust conspiracies may continue in time beyond the original conspiratorial agreement until either the conspiracy's objectives are abandoned or succeed. *Id.*, at 608–609. Thus, it is an unsettled factual issue whether the conspiratorial objectives manifest in the 1980 agreement between HBJ and BRG have continued in spite of the 1982 modifications.

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No. 89-1667. Decided November 26, 1990

JUSTICE MARSHALL, dissenting.

Although I agree that the limited information before us appears to indicate that the Court of Appeals erred in its decision below, I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and significantly increase the risk of an erroneous decision. See *Smith* v. *Ohio*, 494 U. S. ——, —— (1990) (MARSHALL, J., dissenting); *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11–12 (1988) (MARSHALL, J., dissenting); *Rhodes* v. *Stewart*, 488 U. S. 1, 3–4 (1988) (MARSHALL, J., dissenting); *Buchanan* v. *Stanships Inc.*, 485 U. S. 265, 269 (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7–8 (1987) (MARSHALL, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the judgment below.